Supreme Court, U.S.
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NO. _____

In The
Supreme Court of The United States
October Term, 1994

**UNITED MINE WORKERS OF AMERICA
DISTRICT 28,**

Petitioner,

v.

ISLAND CREEK COAL COMPANY

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an arbitrator may enforce a cease and desist order by use of a monetary penalty.

II. Whether refusal to allow an arbitrator to issue a penalty or punitive damages absent express authorization by the remedies portion of the arbitration agreement is violative of this Court's holding in United Paperworkers v. Misco, 484 U.S. 29 (1987).

LIST OF PARTIES

The only parties to this proceeding are named in the caption: United Mine Workers of America, District 28 as Petitioner, and Island Creek Coal Company, as Respondent.

United Mine Workers of America, District 28 is an unincorporated labor organization organized under the auspices of the United Mine Workers of America, International Union. Prior to all events giving rise to this matter, United Mine Workers of America, District 28 was granted autonomy by the United States District Court for the Western District of Virginia.

Island Creek Coal Company is a subsidiary of Occidental Petroleum,

Inc. Since the institution of this proceeding, Island Creek Coal Company has been purchased by Consolidated Coal Company. Island Creek Coal Company is not a parent of any other corporation.

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OFFICIAL AND UNOFFICIAL OPINIONS INVOLVED IN THIS CASE

The Opinion of the United States Court of Appeals for the Fourth Circuit, No. 93-2305, is contained herein at App. at 130.

The Opinion of the United States District Court for the Western District of Virginia, No. 92-0174-A is contained herein at App. at 108.

The decision of Arbitrator Cantor is contained herein in App. at 5.

There are no constitutional provisions, treaties, statutes, ordinances, and regulations involved in this case. The relevant portions of the collective bargaining agreement are set forth in App. at 1.

JURISDICTIONAL STATEMENT

The date of entry of the judgment sought to be reviewed is July 6, 1994.

There has been no request for a rehearing.

The statutory authority for this Petition for Writ of Certiorari is 28 U.S.C. Sect. 1254 (1).

STATEMENT OF THE CASE

Petitioner, United Mine Workers of America, District 28, respectfully submits this brief. For ease of reference, Petitioner will be referred to as "District 28." Respondent will be referred to as "Island Creek." The "National Bituminous Coal Wage Agreement Between Island Creek Corporation and International Union United Mine Workers

of America" will be referred to as the "BCOA agreement."

STATEMENT OF JURISDICTION OF THE COURT OF APPEALS.

The United States Court of Appeals for the Fourth Circuit had jurisdiction to consider the order of the United States District Court for the Western District of Virginia pursuant to 28 U.S.C. Sect. 1291.

FACTS

The controlling agreement is the National Bituminous Coal Wage Agreement Between Island Creek Corporation and International Union, United Mine Workers of America (hereinafter "BCOA"). The relevant portions are set forth in App. at 1.

On March 23, 1981, Arbitrator Marlyn Lugar issued an arbitration award containing a cease and desist order against the performance of classified work by supervisory personnel at Island Creek Coal Company. Arbitrator Lugar also stated that if such violations continued, punitive damages might properly be awarded in the future.

In 1990, following continuous violations of Arbitrator Lugar's cease and desist order, Local 2232 filed an action in the United States District Court for the Western District of Virginia seeking a declaration that Arbitrator Lugar's cease and desist had been violated repeatedly, injunctive relief, and punitive damages. On January 9, 1991, Judge Glen M. Williams

denied the request of Local 2232 for the following reasons:

(1) Although this action was filed as a direct Sect. 301 action, Judge Williams treated it as a suit to enforce.

(2) Judge Williams felt that the question of identity of issues, i.e., the res judicata effects, should be left to the arbitrator, therefore, he felt he could not afford the relief requested by the Union.

Supervisors performing classified work continued. In one such settlement, known as the Curtis Osborne case, the company agreed to comply with the cease and desist order issued in Arbitrator Cantor's decision.

On June 13, 1991, Arbitrator Judah awarded $2,000.00 punitive damages for violation of the company's agreement to abide by Arbitrator Lugar's cease and desist order set forth in the Curtis Osborne case settlement. In addition, Arbitrator Judah ordered the Company to "take such reasonable and practical steps as are necessary to ensure that supervisory employees cease and desist from performing classified work at the VP-5 Mine," thus recapitulating the Lugar decision's cease and desist. No challenge was made to this decision by Island Creek; ordered damages were paid.

The grievance which resulted in the matter presently before this Court was initiated on November 13, 1991. Finding

for the Union, Arbitrator Cantor awarded a penalty for violation of the cease and desist order in the amount of $1,000.00.

Island Creek filed suit in the United States District Court for the Western District of Virginia seeking to set aside that portion of the award which was termed a penalty.

REASONS FOR GRANTING THE WRIT

A. CERTIORARI SHOULD BE GRANTED TO REVERSE THE DECISION OF THE COURT BELOW BECAUSE IT IS DELETERIOUS TO LABOR POLICY AND CONTRARY TO THE DECISIONS OF THIS COURT.

Arbitrator Cantor's decision is clear that the $1,000 awarded is a penalty for Island Creek's violation of the cease and desist order first issued by Arbitrator Lugar in 1981, rather than punitive damages. Nevertheless, the

court below gave short shrift to this distinction, stating in a footnote that the penalty issued by Arbitrator Lugar was in reality punitive damages.

The Fourth Circuit ruling in this matter refuses Arbitrator Lugar the authority to enforce the cease and desist thus leaving District 28 remediless in face of continuous violations of the Agreement.

1. The Decision that Arbitrator Lugar's Penalty is "Punitive Damages", Coupled With the Determination that Punitive Damages Are Not Permitted by the Agreement, Renders the Cease and Desist Meaningless.

Beginning with the Steelworkers trilogy, continuing to the present, this Court has emphasized and reemphasized the goals sought to be reached through

the arbitration procedure and enhancement of those goals through noninterference by the judiciary. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 574 (1960).

Thus, the labor policy set forth in the Steelworkers trilogy, i.e., arbitral flexibility, judicial deference to an arbitrator's superior knowledge of a given business, and extreme skepticism of judicial intrusion into the disputes parties have agreed to arbitrate all militate in favor of the simpler, more

efficient and less costly option of allowing the arbitrator to handle "any and all disputes that arise under the agreement." Warrior and Gulf at 583.

As noted in United Steelworkers of America v. American Manufacturing Co., 363 U.S. 574 (1960):

> Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement. . . . The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator.

Following numerous violations of the Agreement post-Arbitrator Lugar's decision, wherein the first cease and desist was issued, United Mine Workers of America, Local 2232 (the affected

Local in this action, although no longer a party), sought enforcement of the cease and desist in federal court. As noted above, enforcement was refused, in essence, since Judge Williams held that questions of res judicata and enforcement were for the arbitrator. Taking its cue from Judge Williams, District 28 began seeking a penalty, or punitive damages, from the arbitrator. The first award of punitive damages was paid, the second award of a penalty was vacated. Thus, the district court refused to consider a penalty for violation of the cease and desist, holding that enforcement was the arbitrator's domain, and the Fourth Circuit refused to enforce the remedy ultimately issued by an arbitrator.

Accepting the right of the arbitrator to issue a cease and desist, while refusing the arbitrator the right to enforce it by penalty and refusing to enforce it in federal court gut the very essence of the labor policy sought to be furthered by the Steelworkers trilogy.

2. Regardless of the Characterization of the Award as a Penalty or Punitive Damages, the Fourth Circuit Erred In Failing to Follow the Mandate of United Paperworkers v. Misco.

Subsequent to the Steelworkers trilogy, the Supreme Court has again revisited, clarified and strengthened the restraints placed upon federal courts when reviewing arbitration decisions. In W. R. Grace & Co. v.

Rubber Workers, 461 U.S. 757 (1983) this Court, in reinstating the arbitrator's decision set aside by the Fifth Circuit as against public policy, defined the limitations of the federal court in setting aside an arbitral award for public policy reasons. Specifically, this Court noted that an arbitrator's decision may only "be set aside as against public policy if the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant,' and is to be ascertained by reference to the laws and legal precedents and not from 'general considerations of supposed public interests.'" 461 U.S. at 766, quoting Muschany v. United States, 324 U.S. 49,

66 (1945).

In United Paperworkers v. Misco, 484 U.S. 29 (1987), this Court turned its attention to the deferential treatment to be afforded the remedy supplied by the arbitrator.

> "So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined. Furthermore, it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established. . . .

> [So] long as the Arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Misco at 38.

This Court in Misco acknowledges that the parties have the right to limit the arbitrator in his choice of remedies if they so chose. Misco at 41. However, the Fourth Circuit, in adopting a rule that that punitive damages will not be permitted unless expressly authorized by the parties, presents the flip side of the Misco ruling. Where Misco demands deference to the arbitrator's remedies tempered by express language of the parties, the

Fourth Circuit requires absolute prohibition of the arbitrator absent express language to the contrary.

No longer can it be argued or assumed by the courts that punitive damages are so extraordinary that it should be assumed that the parties limited the arbitrator's discretion. Although pre-Misco courts were sometimes hesitant to permit punitive damage awards to stand, all post-Misco holdings concerning punitive damages, with the exception of the Fourth Circuit, have allowed punitive damages pursuant to general "enabling language" or in the absence of express disallowance. A review of the cases is set forth below.

It cannot be argued that the actions of Arbitrator Lugar are limited by the parties. All relevant portions of the collective bargaining agreement between the parties are including in App at 1 through 4. The arbitration jurisdictional clause is extremely broad, arguably permitting disputes that are not contractual in nature. The Agreement is silent on remedies, thus permitting punitive damages, which are now readily accepted in the majority of circuits.

3. The Opinion Below Ignores the Custom of the Parties.

Another well-established principle of labor law ignored by the court below is the particularized knowledge of the

arbitrator of the custom and practices of a particular factory or of a particular industry. Enterprise Wheel at 596. These customs become the "law of the shop."

In the present matter, Island Creek has had a cease and desist in effect since 1981; agreed to the cease and desist in its settlement of the Curtis Osborne grievance, successfully contested a federal court suit seeking to enforce the cease and desist by arguing that same was the domain of the arbitrator; paid punitive damages without protest awarded by Arbitrator Judah; did not object to the submission of the violation of the cease and desist or jurisdiction of Arbitrator Cantor to

award punitive damages or a penalty; then filed the current suit following a disfavorable ruling.

Island Creek, by its own conduct, has tacitly accepted the remedy imposed by Arbitrator Cantor and should not have been permitted to argue for the first time in federal court that the arbitrator lacked jurisdiction to issue a penalty and/or punitive damages.

B. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS, THE MAJORITY OF WHICH ARE ADHERING TO PAPERWORKERS v. MISCO.

Since United Paperworkers v. Misco, 484 U.S. 29 (1987) the treatment of punitive damages in the federal courts has rapidly evolved. Below is a brief summary of the circuits:

FIRST CIRCUIT: In Raytheon Co. v. Automated Business Systems, Inc., 882 F.2d 6, 11-12 (1st Cir. 1989), the court held that the rules of the American Arbitration Association 1/ allow the arbitrator to grant punitive damages.

SECOND CIRCUIT: No clear rule.

THIRD CIRCUIT: In the pre-Misco case of Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir.

1/The AAA rule upon by the First Circuit and other cases cited hereafter states as follows: "The Arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement.

1962) a sharply divided court denied damages on the specific facts of the case.

FOURTH CIRCUIT: The case presently before this Court presents the evolving standard of the Fourth Circuit which is now that punitive damages are not permissible unless specifically authorized by the collective bargaining/arbitration agreement.

FIFTH CIRCUIT: As early as 1975, the court, in Local 369, Bakery & C. Wkrs. I. U. v. Cotton Bak. Co., Inc., 514 F.2d 1235 (5th Cir. 1975) permits punitive damages citing the limited role of the federal courts.

SIXTH CIRCUIT: In Intern. Molders v. Brooks Foundry, Inc., 892 F.2d 1284 (6th

Cir. 1990), the court, relying heavily on Misco, appears to authorize punitive damages.

SEVENTH CIRCUIT: In Local 416, Sheetmetal Wkrs v. Helgesteel, 335 F.Supp. 812 (W.D. Wisc. 1971), aff'd 507 F.2d 1053 (7th Cir. 1974), the court, faced with an agreement which was silent concerning the arbitrator's power to fashion remedies, held that since the arbitrator arguably had the power to grant punitive damages, his award would be sustained.

EIGHTH CIRCUIT: In Lee v. Chica, 983 F.2d 883 (8th Cir. 1993), the court held that the rules of the American Arbitration Association, previously cited in footnote 1, gave the arbitrator authority to grant punitive damages.

NINTH CIRCUIT: In Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991), the court held that the rules of the American Arbitration Association, previously cited in footnote 1, gave the arbitrator authority to grant punitive damages. Interestingly, this court had previously denied punitive damages absent an express contract provision permitting them, but reversed its previous authority in the wake of Misco. See also Goss Golden v. Sheet Metal Workers, Local 104, 933 F.2d 759 (9th Cir. 1991) for this court's consideration of necessary changes in light of Misco.

TENTH CIRCUIT: No clear ruling.

ELEVENTH CIRCUIT: In Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353, 359 (N.D. Ala. 1984), aff'd 776 F.2d 269 (11th Cir. 1985) the Eleventh Circuit held that proper deference to arbitration decisions requires allowing punitive damages.

D. C. CIRCUIT: No clear ruling.

Thus, the Fourth Circuit is the only Circuit clearly clinging to the pre-Misco requirement that the contract must give express authority to the arbitrator to grant punitive damages for same to be sustainable.

SUMMARY

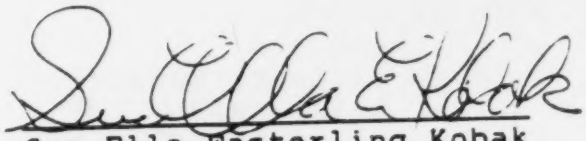
Petitioner respectfully requests that this Court grant certiorari to consider the proper standards for an arbitrator to grant punitive damages and/or a penalty for violation of a cease and desist order since:

1. The opinion of the Fourth Circuit renders the arbitrator helpless to enforce a cease and desist, which is contrary to labor policy as set forth in this Court's opinions;

2. This Court's holding in United Paperworkers v. Misco, as well as It's previous holdings require deference to the arbitral choice of remedies unless the parties choose to limit such choices; and

3. There is a conflict in the circuits concerning the proper law to apply concerning punitive damages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 1994, in compliance with Rule 29 of the Rules of the United States Supreme Court, three true copies of the foregoing Petition for Writ of Certiorari were sent by first class mail, postage prepaid, to

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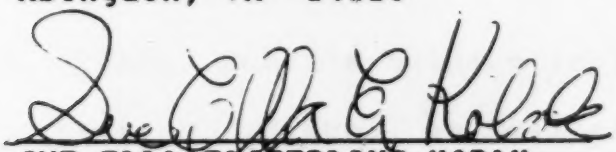

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APPENDIX

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The controlling agreement is the National Bituminous Coal Wage Agreement Between Island Creek Corporation and International Union, United Mine Workers of America (hereinafter "BCOA"). Of particular importance to the dispute currently before this Court are the following provisions:

a. **Article IA--SCOPE AND COVERAGE**

Section (c) **Supervisors Shall Not Perform Classified Work**

> Supervisory employees shall perform no classified work covered by this Agreement except in emergencies and except if such work is necessary for the purpose of training or instructing classified Employees. When a dispute arises under this section, it shall be adjudicated through the grievance machinery and in such proceedings the following rule will apply: the burden is

on the Employer to prove that classified work has not been performed by supervisory personnel.

b. **Article XXVII--MAINTAIN INTEGRITY OF CONTRACT AND RESORT TO COURTS**

The United Mine Workers of America and the Employers agree and affirm that, except as provided herein, they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" Article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract and by collective bargaining without recourse to the courts.

The Employer, however, expressly authorizes the Union to seek judicial

relief, without exhausting the grievance machinery, in cases involving successorship.

c. **Article XXIII--SETTLEMENT OF DISPUTES**

Section (c) Grievance Procedure

> Should differences arise between the Mine Workers and an Employer as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.
>
> Disputes arising under this Agreement shall be resolved as follows: . . . [the remainder of this section discusses time periods and various other procedural matters.

d. **Section (h) Finality of Decision or Settlement**

> Settlements reached at any step of the grievance procedure shall be final and binding on both parties and shall not be subject to further proceedings under this Article except by mutual agreement. Settlements reached at steps 2 and 3 shall be in writing and signed by appropriate representatives of the Union and the Employer.

The only exceptions to the arbitration clause set forth above are: **Article XXIV--DISCHARGE PROCEDURE**, which provides for a more rapid method of arbitration; and **Article III--HEALTH AND SAFETY**, which provides for different participants in the earlier stages of the grievance, but ultimately is resolved in accordance with the arbitration procedure set forth in **Article XXIII.**

ARBITRATION AWARD

ISLAND CREEK CORPORATION
Oakwood, VA

AND

INTERNATIONAL UNION; UNITED MINE WORKERS OF AMERICA, LOCAL 2232

STATEMENT OF THE CASE

These proceedings were initated by the grievance of Kenneth Wagner filed November 13, 1991, which reads:

"I charge a member of mgt. (Teddy Collins) in violation of Art. I A, Sec. c. Collins performed classified work that is the normal duties of the employees on his section on the dates 10-1-91, 10-9-91 & 10-10-91. I am asking for 24 hrs. at my regular rate of pay."

And the Mine Committee endorse this grievance by saying:

"Committee agrees with griev. This is in violation of two arbitrator decisions governing this issue. Local union request $10,000.00 punitive damage."

The matter was not otherwise resolved in the course of the grievance procedures permitted by the Contract and it was brought on for hearing in this arbitration.

Contract PROVISIONS

The applicable Contract provisions appear in Article IA - Scope and Coverage.

"Section (c) **Supervisors Shall Not Perform Classified Work**

Supervisory employees shall perform no classified work covered by

this Agreement except in emergencies and except if such work is necessary for the purpose of training or instructing classified Employees. When a dispute arises under this section, it shall be adjudicated through the grievance machinery and in such proceedings the following rule will apply: the burden is on the Employer to prove that classified work has not been performed by supervisory personnel.

PRELIMINARY MATTERS
COURT REPORTER

When the parties met for the hearing in this arbitration at 9 a.m. on September 17, 1992 in the meeting room at the Southwest Virginia Community College, Management appeared with a

court reporter. The Union thereupon objected to the Company's use of a court reporter, noting that for one thing, the contract "does not call for a court reporter" and also stated that the contract says that the arbitrator must record the hearing. See contract, Article XXIII, Section (c) (4). They also tendered an arbitration award in which Arbitrator Feldman held that an employed court reporter could not be brought in and the question was a reason for postponing the hearing.

Management responded that the Union had not disclosed their objection as required under the "Full Disclosure Requirement" appearing in Article XXIII of the contract. The fact of their

intention to record the hearing was known to the Union for several months and no objection had been raised. They also remarked that the Union had, on a prior occasion at least, brought in a hired court reporter. The contract does not say that it may not unilaterally be recorded. Management said that there are other arbitration decisions that permit one party or the other to record the hearing, but they were not available because of the shortness of notice of the objection.

See Article XXIII, Paragraph 4, Section (e):

"In cases in which the parties have agreed that there is no question of fact involving grievance, the arbitrator may

decide the case on the basis of joint statement of the parties, exhibits shall be submitted. The hearing shall be recorded by the arbitrator and shall be closed upon completion of the testimony."

Whereupon the arbitrator ruled that either party, for their own purposes, could record the transactions at the hearing, but that, under the Contract, it would not be an official record. The arbitrator offered to record the hearing on his own machine, except that thereafter, before the matter went to evidence, the parties stipulated that both would join in the court reporter's expenses, each party would have a copy of the record and the arbitrator would be supplied a copy.

AVAILABLE EVIDENCE

The Union thereupon raised the further issue that, on this arbitration in prior stages of the grievance procedures, Management had said that no classified work had been done with the exception of coupling a pipe which was intended as a training action and hanging a line curtain which was intended as instructing employees who appeared not to be able to do it as is permissible under the Contract. At a previous date approximately 60 days before, Management advised the Union that they were going to present evidence that it was a practice for classified employees to ask supervisors to perform classified work with the thought that

supervisors are allowed to perform such work when asked and that it was a "practice" in this mine. The Union had asked the Management to identify the employees who have asked for such assistance for purposes of investigation, but it was refused. The Union then took the position that they would object to the issue. More recently, Management advised that they had two witnesses who would testify and the Union wanted Management to clarify their position. This position is inconsistent with the positions taken by Management at the earlier stages that there had been no classified work done except in the two instances indicated within the terms of hte Contractual exceptions.

Management responded that there had been no change in positions, but that it was the common practice of classified employees asking for supervisors to help and that this would be offered as a response to the charge that Management was condoning these violations on which the Union was asking for punitive damages. It was further stated that if the Union was unsure of the defenses, then it was their suggestion that the rule of Arbitration Review Board, Case No. 789, be followed requiring full disclosure and if there is objection raised indicating it had not been followed, that the matter should be referred back to the third step for full discussion on the basis of those facts.

The Union's response was they had no desire to delay the hearing. The Union had not been able to identify those witnesses.

The Union also said that classified people cannot negotiate on the Contract for variations or exceptions and, therefore, there can be no practice that something was done.

The arbitrator, on reviewing the matter, noted that the demand had been made for "punitive damages" in the Mine Committees statement. It also then appeared that previous decisions by Arbitrator Marlyn Lugar and by Arbitrator Peter Judah provided that after a Cease and Desist Order, "punitive damages" at this shop and on

this charge could be allowed. It appears that "punitive damages" is based on that history and that the testimony of the two witnesses, as it had been described, probably would be admissible on that subject. If disclosure was necessary, then they should be disclosed and the matter should be adjourned if requested. The Union, however, stated that they did not want to go back to Step 3. The Union withdrew its objection. The proceedings went forward in arbitration.

FACTS OF THE CASE

Witness No. 1: Jimmy Deel, Miner Operator.

The first date referred to was October 9, 1991 at which time Teddy Collins was described as having performed classified work:

(a) Hanging hangers up the hang miner cable (on either the 9th or the 10th).

(b) Hanging charger cable.

(c) Moving cable out of the way.

October 10, 1991

(d) Blowing dust with a pinner duster.

(e) Pulling curtain out.

Witness No. 2: Mark Rife, Roof Bolter:

On October 9, he saw Supervisor Teddy Collins:

(a) "Went and got some water fittings and help couple a water line".

(b) "Hooking a scoop duster up".

On cross-examination, Mr. Rife was asked if he had ever asked a foreman to help do work and he said he had once or twice, "in a bind". The fellow worker, Jimmy Deel, had filed a grievance based on that earlier fact.

The occasion referred to by the witness when there were "a couple bundles of plates there and I just asked Teddy to help throw them on there because we was having to pack to save us a trip down there".

Witness No. 3: Kenneth Wagner, the grievant, Miner Operator.

October 1st saw Teddy Collins perform classified work.

(a) Setting timbers, hanging -- pulling up the curtain.

October 9 and October 10:

(b) Setting timbers.

(c) Helped dust return.

(d) Pulling up water hose.

(e) Setting line.

(f) Blowing dust with a pinner duster down behind the curtain in return.

(g) Setting line curtain.

(h) Setting pogos.

(i) Helped load pogos.

(j) Line curtain.

(k) Timbers on the scoop, including help on loading.

(l) Putting extendable curtain rod on a miner curtain.

(m) Picking up scoop duster.

The witness added that he had worked on these things "throughout each shift".

On cross-examination, it appeared that the witness had not seen the operation of the dusting machine, but when he came back found that it had been used and he and his friend had both gone to lunch and only the foreman had been present.

When asked if he had ever asked Collins to help him, "either last Wednesday or last Tuesday" (week before the hearing), he remembered that he had

asked, but admitted that Collins had refused to do the work, but he denied that he had responded to the refusal by saying that "no one was watching".

No particular amount of time used by foremen in doing these things was shown.

No work time was shown to have been lost by any particular employee.

Witness No. 4: Joe Clark, Safety Representative for the Union, previously Chariman of the Mine Committee at this mine:

On inquiry put, he said there had been numerous grievances of this kind and that there had been discussion between him and the mine foreman. He had been asked for a week to get the

word out, which he agreed to. During the week, he said that Management had continued to violate the Contract. No grievances were filed during that period of time. This was when he went back in 1989. Exhibit was made of 16 grievances that had been filed on this issue since then. Most of these particular grievances were settled on an offer made by Management to pay the grievants a stated number of hours pay.

Witness No. 5: Chris Lester, Chairman of the Mine Committee.

He identified the pending grievances on the same subject. There was a packet of six grievances that had been settled by payments made to grievants. One case, however, had been

referred to arbitration on the grievance of Russell Barton and heard by Arbitrator Peter Judah on which, as will appear below, an arbitration award was issued, including $2,000.00 punitive damages.

Since that decision, it appears no further grievances have been settled in the grievance procedures. All have been denied.

An objection was entered to the introduction of unresolved grievances, which objection was specifically noted.

These grievances were on a number of supervisors, but on Collins he said there were one or two.

A number of grievances on this subject, some settled and some denied, were tendered in evidence to show the extent of repeated Contract violations.

Management then called the next witness.

Witness No. 6: Eddie Ball, Mine Manager.

He had previously worked at this mine, but now had returned a year and two months before, in July of 1991, as the manager, supervising approximately 280 employees processing coal on three non-rotating shifts.

The witness was acquainted with the current grievance and participated in grievance procedures October and November of 1991. The first time he was

aware that punitive damages were asked for was after Step 2 when the Mine Committee had entered its position and Management had to sign off on it.

At the time this witness came to the mine, there were 19 outstanding grievances, many of them for foremen working. As an initial effort on his part, he offered to try to settle these grievances and did settle 19 of them eventually, including all foremen working grievances.

Reference complaints about supervisors working, he told the Union that he would "address all problems" and "would do everything possible". He suggested it would take a while. He followed that with meetings with the

foremen, instructing them to follow the terms of the Contract. He later became acquainted with Arbitrator Judah's decision. His first instructions had some effect, but he continued to have a problem or two and he called the foremen back and initiated a system of progressive discipline (on foremen) in these cases. He has invoked this discipline and applied it.

In September, 1991, he learned of Arbitrator Judah's decision. In twelve months prior to that date, there had been 35 grievances filed that came to the Second Step referring to foremen working only. In 11 1/2 months since that time, there have been 10 grievances, 9 of which went to the Second Step.

The witness declared he did not allow foremen to perform classified work and if they do, they were subject to disciplinary action and he does not condone any such activity.

The manager goes underground on occasions and he has had classified employees ask him to help with work and it has happened quite often. He described one instance. Even he had helped an employee with a particularly clumsy and heavy problem of lifting something. The employee reported it to another employee and the other employee filed a grievance which, in turn, was settled.

Witness No. 7: Teddy Collins, Section Foreman.

He was directly asked about the charges made against him by the witnesses for the Union, it which case he denied each and all of them except two instances, one where the employee, Jerry Vanover, on October 1st was supposed to put up a check curtain, which he was not doing properly. He could not get it tight. He couldn't get the pogo set up. It is not a very difficult problem and after he tried several times and failed, "I demonstrated to him how I wanted it done...".

It was done in Order to demonstrate how to install the pogo stick, which is a spring loaded, two piece jack. It took 45 seconds. He did have a problem

on October 9 when Rife and Wagner were trying to install a curtain trying to get the line curtain on an extendable rod, one that had three plates. They did not appear able to do it and what he had done was to reach out and hold the rod and told them to stop and told them how to lay the pleats, but they were the ones who actually threaded the line.

Also on that date, these same employees had a ruptured water line. The foreman had to tell them that he needed the line hooked up and in telling them, he put his hand on one and reached over to the other. He did not put the lines together and fasten them and was one of the classified employees.

On that day they did challenge him about "blowing dust" to which he said that he had not done it.

Later, another employee was having difficulty coupling a hydraulic fluid hose and he was not using a hammer to strike it into position. When the employee said he did not have a hammer, the foremen handed him a hammer and said "you got to hit it like that", which the employee did and completed the job.

On October 10, an employee was supposed to be scattering rock dust and he was using his knuckles to hit the bag and break it open. The foreman suggested an easier way. He opened his pocket knife and split the bag and said "I'll let you have my knife", but the

employee said he would rather do it with his knuckle.

The witness reported a confrontation with Wagner, the grievant, over a specific job that Wagner had been instructed to do about the depth of a hole to be drilled. At this, Wagner had become angry. Wagner directly filed four grievances arising out of this particular shift when it arose, including the one at issue here.

This witness said he had been asked many times by classified employees for help as recently as the preceding Tuesday.

Witness No. 8: Harry Litteral, General Foreman.

He described in detail on being asked by a classified employee to help out "almost on a daily basis", as recently as the first of the week preceding this hearing in arbitration. Both Wagner and Rife had, on one occasion or another, asked him and he named others.

On cross-examination, he said that when asked the first of the week, he had handed the employees a wrench. He denied that he always did this.

Witness No. 9: Calvin Ward, Manager of Mine Support Services.

He referred to various discussions and settlements and to his knowledge of hte preceding arbitration decisions.

Witness Jimmy Deel was recalled.

He responded to a "confrontation" regarding the depth of a hole requested to be drilled that had been described by Mr. Collins.

Witness Eddie Ball on recall.

He testified to a particular grievance which had been settled and said that it was one of the 19 that he undertook to dispose of when he first came back to work.

ARBITRATION AWARDS IN EVIDENCE

The parties made exhibit of and argued from two arbitration awards, one by Arbitrator Maryln E. Lugar and the other by Arbitrator Peter Judah.

A. March 5, 1981, Arbitrator Maryln E. Lugar heard a grievance at this same mine. The demand was pay for

the grievant for seven shifts on which a seciton forman had performed classified work. There was no dispute but that the section forman had performed classified work. The discussion, then, was a review of applicable procedures and consideration of appropriate remedies.

Based on the proposition that the grievance forms have to fairly state the offenses on which the grievance is raised, it must also state the defenses on which Management relies. In this case, they had denied a Contract violation, but had not asserted either of the specific Contractual defenses as an emergency or for the purpose of training or instruction. Because of this, the arbitrator limited the scope

of his review to whether the Contract was violated, to consideration of the nature of the work performed and the amount of such work which he performed.

The language of the Contract, being as specific as it is, is strictly enforced by some.

The rule, as established and applied by Mr. Lugar and other arbitrators, is that the defense of de minimis, even though he had earlier wanted to apply it, is not applicable.

The individual employee was not awarded any damages. The work was described as "lending a hand" and he had not been deprived of any work. On this the arbitrator refers to a decision by the Arbitration Review Board, an

arbitration review agency once in place, but now discontinued, but whose opinions continue to be binding under this Contract, in which it was held that lost wages could be Ordered only if someone should have been offered the work and was not or had been displaced by the work that was done. On the other hand, the suggestion that "lending a hand" is a defense is rejected. In the absence of proof of lost pay, the grievant will not be awarded compensation.

Reference is made to ARB 78-26, March 18, 1980. The Review Board had stated only that the basic remedy was a mandatory Order to cease such performance by the supervisor. The suggestion that the damages might go to

the Union representing all the people was not there endorsed. There is a history amongst the arbitrators in the industry to adopt the "cease and desist" approach.

Arbitrator Lugar discusses the possibility of damages for repeated violation which he refers to as "punitive damages". He says that they might be available without a mandatory Order to cease, but the upshot of an extensive discussion is that after a "cease and desist" Order, a penalty for violation of the Order would be possible. He has referred to this penalty under the phrase "punitive damages".

In the actual decision, Arbitrator Lugar held that the grievant had standing to raise the question and that the company was directed to cease permitting supervisory employees to perform classified work except as permitted in the Contract.

B. The second opinion introduced as evidence was the decision of Arbitrator Peter J. Judah, June 13, 1991, a grievance at this same mine complaining that supervisors had done classified work. There was evidence that this had been a continuing problem at this mine. Arbitrator Lugar's 1981 decision was urged as controlling this case. Arbitrator Judah found that there

had been a continuing problem at this mine. He expressly found that the supervisor had done classified work. The work that he may have done was not adequately detailed.

Arbitrator Judah was of the opinion that Arbitrator Lugar's award said that punitive damages could be considered. Management had expressly agreed to follow the Lugar decision. To this point he makes reference to "the Curtis Osborne case", September 13, 1988 in which the Lugar award is especially mentioned and the case settled on Company's agreement. Arbitrator Judah then says:

"It is to be noted, however, that the basis of an award of punitive

damages in this case is not founded upon the NBC Wage Agreement, but upon the agreement made by the parties arising out of the Curtis Osborne case."

The arbitrator then awarded no compensatory pay to the individual grievant, but having reviewed "a number of factors, including the fact that there is evidence of a continuing problem", but not otherwise specifying what other factors were considered, he granted an award of $2,000.00 in punitive damages and renewed the mandate of cease and desist.

It is a fact in this case that the Company has received and is operating under a Cease and Desist order entered by Marlyn Lugar and reaffirmed by Arbitrator Judah.

CONTENTIONS OF THE PARTIES

The parties stated their position at the opening of the hearing and then at the direction of the arbitrator, were asked to supply Briefs to the point that it would clarify the application of their position to the evidence as it had actually been heard.

A. The Union says that the rules of arbitration under this contract follow the principal of res judicata. The conduct of the party was directly dealt with by Arbitrator Lugar who entered a Cease and Desist order. In that ruling, the arbitrator said that the Company would be liable for punitive damages if they continued to allow supervisors to perform classified work.

Furthermore, the 1989 Curtis Osborne grievance settlement, Management is said to have agreed to follow that Cease and Desist order is applicable now as is the decision of Arbitrator Peter Judah, who actually heard the case and awarded $2,000.00 in punitive damages.

The Union says that they have done everything they could to get the Company to stop the practice. They have tried settling grievances on a grievant that the orders would be followed, but all have failed. The Company continues to this date to ignore the contract, even since the Arbitrator Peter Judah's decision in 1991.

Since that time, the Company has not settled a single case. Nine

grievances are pending. The Company always takes the same position that the foreman had done no classified work. The Company's series of defaults have not been corrected.

Supervisor Collins did classified work.

As to the proposition of the testimony which Company appears to be prepared to offer, it was announced that Article 1 (a), Section D, would be invoked to support its position and Article 1, Article 26, Section (b) and Article 29.

The relief they seek to award the grievant 24 hours at straight time pay and award the Union $10,000.00 as punitive damages "for the expenses they have incurred in their attempt to stop

the Company from continuing to flagrantly violate Article Ia, Section (c)".

In their Brief, the Union argues substantially the same position, but expands on their demand for "punitive damages" and suggest that the expenses of processing the grievance should include the arbitrator's fee, the lost time of the local committeemen and the witnesses, the preparation time and all other expenses. They say that the grievant also lost time and when he had to miss work to attend the arbitration. All of this was the result of hte willful violation. The previous decisions in this matter are res judicata.

As to the defense of the Company that "classified employees are constantly entrapping supervisors", the contract does not permit regular employees to change in terms of the contract. It would appear the supervisors should learn how to say no. It is "is just another ploy to try to convince the arbitrator to deny the grievance and overturn the two prior arbitrator's awards".

For all of this they say they are entitled to the relief for which they have asked.

B. Management says that the evidence will show that the only classified work that caused either of them to appear to do was because of instructing classified employees, which

the contract specifically permits, or to train employees which the contract specifically permits.

As to "punitive damages", the Union appears to argue that Company has condoned this conduct and has ignored the Cease and Desist order. The Company would show that they did not permit foremen to violate the agreement and that they had taken several steps to comply with the mandates of both the Judah and Lugar decisions, including such things as conducting training classes to teach the foremen how to stay out ofthe situations. It is not proper to expand this grievance. Under the contract and with reference to ARB Case No. 78-49 and ARB Case No. 78-26, "an

arbitrator does not have authority to grant punitive damages". Arbitrator Judah was incorrect.

Management, in its Brief, discusses these points at some greater length. Management had not expanded the grievance and it deals only with the issue of supervisors performing classified work. On the testimony of the foreman, he had only done three things either to instruct or demonstrate.

Whatever appears here was de minimis.

When the Union asked for 24 hours at the regular rate, the basic remedy permissible is only to make the wrong party whole. Reference is made to ARB

Case No. 78-26 and ARB Case No. 78-49, both of which say that it is compensatory damages to expect it or compensatory and are not punitive.

As a matter of fact, this has been held by a Federal Court to be the rule in cases under the contract. In the case of Westmoreland Coal Company v. District 28 UMWA, Local 8181, 550 Fed. Suppl. 104 (1992), the same ruling was made to another Federal Case in which they vacated the arbitrator's decision because there had been no finding of a monetary loss. The Brief lists 9 additional arbitrations which Management says are in their favor, of which copies have been supplied with the Briefs.

Grievances made exhibit in this case are non-precedental. They have no

effect on this grievance which was subsequent to them. They are attempting to reopen settled grievances. None of these grievances, even those that have been settled "in a precedent fashion" do not show that there has been a continuing problem. Other arbitrators have refused to recognize other grievances as evidence even on request for punitive damages.

The suggestion that the Company should pay the expenses of the arbitration are contrary to the contract, which, in Article XXIII, Section (b) says that parties share the costs equally.

Classified employees consistently ask the supervisors to do work for them

or with them. The fact should bar the claim that the Company is "deliberately allowing foremen".

Management refers to Lugar's statement that compensatory damages could be awarded at premium pay for an entire shift, even though the supervisor performed classified work for no more than eight minutes, but that he did not mandate "punitive damamges".

As to punitive damage, Arbitrator Judah's decision is a bad judgment. Management never agreed to pay punitive damages on the Cease and Desist order. There is no such evidence of any additional contract.

As to what is binding in the previous decisions, ARB Case No. 78-24

lays down four criteria before prior decision can be binding. Management says that this case does not contain the same fact situation as in the earlier cases.

Under all this, the Union is not entitled to any relief for the grievant or for themselves. That in no event could anything be done other than make someone whole.

DISCUSSION

The history of the collective bargaining relationship between the United Mine Workers of America and the Bituminous Coal Industry is long and contains much detail. The relationship goes back well into the earlier years of this century, if not before. The

current contract is the current statement ofthe matter which have been negotiated, tried out and renegotiated. In point of fact, the provision in the current contract which forbids supervisors to do classified work has been in the contracts in this industry from the earliest dates. The cases offered for reference in this arbitration themselves show the frequency of dispute on the question of supervisors working.

The parties must have meant what they said. The contract must be enforced specifically as written.

The current contract provisions read:

"Section (c) Supervisors Shall Not Perform Classified Work

Supervisory employees shall perform no classified work covered by this Agreement except in emergencies and except if such work is necessary for the purpose of training or instructing classified Employees. When a dispute arises under this section, it shall be adjudicated through the grievance machinery, and in such proceedings the following rule will apply: the burden is on the Employer to prove that classified work has not been performed by supervisory personnel".

It is noted:

1. That the testimony of the parties in this arbitration is weighed

by the arbitrator with the burden on Management to prove that they did not do classified work.

2. The charge of a supervisor having done work can be defended either that it was necessary to train or instruct an employee or that it was a matter of emergency. There are no other stated defenses to this proposition.

3. The conclusion from the language as endorsed by the several arbitration opinions is that it is a flat rule that supervisors shall not do classified work.

Clearly, the purpose of the rule is to protect the body of work embraced by the contract for performance by

classified employees. It suggests that at some prior time other management had tried to limit the Union's membership and/or their efforts to protect their members. The answer at this point, and at similar points mentioned in the contract, was, and is, to forbid any invasion of the body of work by any means, absolutely and flatly stated.

Any suggested defenses such as that this work was too minor to count, or that classified employees asked for help, simply are not available. Management has assumed the burden of the contract to keep classified work for classified employees. They will have to deliver on their promises.

The question of what relief can be given, however, in the event a supervisor has done classified work is not as clearly dated and has been discussed repeatedly in arbitrations and court decisions. On the one hand, there is the language in Mr. Lugar's opinion, which represents a substantial portion of the received wisdom in this industry, that where a supervisor has done classified work, the grieving employee could be paid compensatory pay even, as Lugar says, a full shift at time and one-half premium pay in the nature of a damage. There is great logic in that there is a damage even though it is difficult to identify.

On the other hand, strict minded jurists have tried to impose a common law concept of specifically identified monetary loss before any "actual" damage can be allowed.

Those opinions have not found the historical depth of the contract and the long history of its construction and application. Lost time because of these invasions has always been broadly identified. The jurisprudence used in the industry recognized the contract as the source, but also recognized that it was not a contract between merchants. If an employee's protected time is invaded, he can be broadly compensated. This should be, nevertheless, a payment for a real loss.

The rule against de minimis as a defense to the accusation equally does not apply to the amount of damages to be allowed.

On the subject of damages, there have been a variety of positions taken by a generation or more of arbitrators trying to deal with the problem. The material supplied to this arbitrator includes the following items on the subject:

December 30, 1980, Arbitrator Lieberman in refusing damages to the individual, allowed $1,000.00 award given to the local Union "as a means of preserving the integrity of the agreement".

In 1981, we have Arbitrator Lugar's decision that postulates the possibility of a full shift at premium pay.

In 1982, Arbitrator Warns held where a person had improperly been denied access to the panel of a successor Company, that the grievant and the Union were not entitled to damages, but that the district was given $10,000.00 as damages, apparently compensatory, for the expense of pursuing the dispute.

In 1983, Arbitrator Searce gave a grievant who had been inappropriately assigned with no loss of pay, six hours in "punitive damages".

In 1984, Arbitrator Roberts, in a case involving misassignment of the

employee with a background of similar violations, gave the grievant three shifts of eight hours at time and one-half as a monetary damage.

In 1991, Arbitrator Judah, gave damage to the Union, called punitive, of $2,000.00 for repeated violations of the supervisors working rule.

In 1991, Arbitrator Dissen, on a issue of supervisors doing classified work, gave the grievants one shift pay at time and one-half at 6% interest and further ordered the employer to pay the Union's share of the fees incurred in arbitrating the matter at issue.

In 1991, Arbitrator Duff, finding that there had been no interruption of work, but there had been a violation of

the notice provisions, gave no individual damages, but ordered Management to bear the entire costs and the expenses of the arbitration.

In 1992, Arbitrator Stoitenberg at this same mine on an issue of supervisors working when they had failed to appoint a dispatcher when the track was in operation, decreed a Cease and Desist order because the grievance had not originally named a claim for the Union's demand for punitive damages.

On Management's side, in December, 1979, ARB Decision 78-16, Chief Umpire Selby declared that monetary damages are limited to the amount so far as money can achieve it, will compensate the aggrieved party for his losses. Nothing was said beyond that subject.

In 1980, ARB Decision 78-26, Chief Umpire Selby dealt with supervisors performing classified work and recited that the basic remedy was mandatory order to cease and desist. He says further that if the performance caused a loss to one or more employees, that loss should be compensated, specifying the amount. The loss, however, is subject that it show that the grievant had, in fact, (1) had a right to the work, (2) that he was, in fact, deprived of the work, (3) that his loss is shown "with a reasonable degree of certainty as to the amount". This was in response to a demand that the arbitrator order the creation of a new position.

In 1980, Arbitrator Davies, on the same issue, referred to ARB 78-49, that damages are analogous to compensation for loss and went on to hold that he was "forbidden" to set any amount as a penalty.

In 1982, District Judge Williams declared that there was no authority by any stretch of an arbitrator's powers to award a "purely punitive damage as a remedy for violation of the collective bargaining agreement". On this we notice that the judge was dealing with a straightforward first breach and claim for compensation case where the arbitrator had added in that simple set of facts a punitive damage.

In 1985, Arbitrator Feldman held that he had no authority to grant more than enough damage to compensate the grievant. He gave the grievant four hours premium pay and then an order of cease and desist was entered, but no other remedy was provided. Here, again, we notice that the case was one of a simple first order breach and before any Cease and Desist order had been entered.

In 1985, Arbitrator Clarke in a case with a past history of difficulty, quotes the ARB Decision 78-26 and recognizes a Cease and Desist order, but as to "damages", found that they had not been specifically proven. As far as any penalty to make the Company supervise the supervisors more closely, he found

that the Company was already working on that problem. The relief was three hours pay at straight time and a Cease and Desist order.

In 1985, Arbitrator Hayford, dealing with a breach of the contract requirements, the order in which employees should be called, put aside the Union's request for additional penalty and allowed none, but gave for non-punitive relief based on one-half hour of earnings for a lost lunch hour.

In 1988, Arbitrator Phelan limited the award to a Cease and Desist order. There was no prior order and there was no substantial loss shown by the employees directly.

The balance of the decisions

offered for consideration have generally required some direct proof of a loss to the grievant before they could get any compensation. It might be noticed that none of those cases had a prior Cease and Desist order pending and they usually look for lost time.

In 1990, Arbitrator Williams inappropriately used the de minimis rule in a case of supervisor's doing classified work.

In 1990, Arbitrator Whyte, dealing with another mine at this same Company, recognized no prior order and denied punitive damages and also denied compensatory damages because none had "actually lost wages".

In 1991, District Judge Copenhaver in a "contracting out" case, voided an

arbitration award that gave the Union an amount equal to 100 hours compensation. The Court is quoted as saying that even though the arbitrator did not call it punitive, it was and that it could not be allowed.

Reviewing all these cases as regards to compensatory damages for work time lost, it has to be an accepted rule that there must be some direct connection between lost time and the compensation to the individual grievant. Arbitrator Lugar's statement early on that there could be compensation given for even a whole shift at time and one-half for what appeared to be a relatively minor period of time used, is not out of line with

the contract and is consistent with history. The amount in any particular case, however, cannot go so far as to make it a penalty. There must be reasonable limits. The damage to be given should be appropriate in terms of lost or diverted time, but it need not be lost time spelled out minute by minute.

On the facts of the present case, the evidence shows infractions from time to time and the effect is broadly distributed over the work period. The evidence shows a substantial number of repetitions over shifts during three separate days, one on one day, several on the others. The action and time is not spelled out by a stop clock, but

there is a showing that work time was interfered with.

As to whose time was interfered with, that again is not specifically shown. Any of the employees ont he shift could have claimed it. Individual grievants have repeatedly been given awards because they called the Company's hand and showed that they were themselves affected by the invasion of their work time. Degree in dtail may not be clearly specified, but the fact of a direct connection does appear. We hold that a direct damage can be given to the grievant based on the invasion of work time and consistently as logic permits in the terms of the whole facts of the case identified.

It is appropriate to remark that care and consideration must be given to the "lend-a-hand" situation. That fact does not appear in this evidence on these particular events. It is clear that it has happened from time to time. Where it does appear, the contract makes the act itself almost indefensible by Management. For any arbitrator in any case, care must be taken to avoid invidious impositions, trickery, chicanery or even entrapment. The money damage should be reasonable, can be broad, but must not invite profiteering.

The contract provides for its own enforcement. The system of grievance arbitrations is directed to that purpose. In less complicated

situations, arbitrators have consistently tried to compensate the employee for lost time and wages. This is a universal rule and has not, to our knowledge, been questioned.

The background facts in this case show that the problem can take another step. Repeated violators of a contract rule demand emphasis to provide protection from the contractual system. As it appears, arbitrators have used a variety of means under various names to do more than compensate the immediate damage. The reference to "punitive damage" is found and even without a name, can lead to a decision like the one Judge Copenhaver overturned. The language of the contract does not use that phrase.

Again, however, the contract provides for and asks for enforcement. Arbitrator Lugar set a proper path based on that understanding of the sense of the contract. If there is something more than a straight forward violation, if there is a pattern of repeated violations, then there can and should be a mandage to cease and desist.

A Cease and Desist order itself, however, must be enforceable. It does not require the existence of a new contract, even though Arbitrator Judah reached for that further support for his decision. The straightforward fact that the Company had been ordered to stop it is sufficient to authorize the arbitrator standing in the stead, as he

does, of courts of general jurisdiction for the purpose of dealing with this contract, to lay down a reasonable amount as a rule constituting the imposition of a penalty for violation of a prior order of quasi-judicial body.

This is not "punitive damages" in the tort sense. The application of htat term to damages given in this situation is absolutely inappropriate. It is an enforcement penalty and it stands as such and is justified by the long history within the Bituminous Coal Industry contract. The contract has grown over time as a way of life. To those who live by it, there must be no wrong without a remedy. Frustrations have led to Cease and Desist orders.

Such an order means nothing unless it can be enforced. The contract contemplates effective enforcement.

The Union asks for the enforcement penalty to be imposed and to paid to them. A collective bargaining agreement is a three sided transaction. In an arbitration, the grievant and the Union each have a related but an independent body of rights. It follows that on a general rule to Cease and Desist, the Union is a proper moving party and could be with or without an individual grievant. As the proper case, it is possible that the enforcement award should be given to the Union.

The arbitrator, on reading the four corners of this contract in the context of this industry holds that:

1. That any invasion of an employee's work time by the intervention of a supervisor doing classified work is sufficient direct evidence and proof of an actual damage inflicted on the grievant. The grievant, who filed the grievance which ultimately comes to arbitration, is entitled to a damage based on an assessment of the broad influence of the actions of the supervisor on the employment which the grievant was then and there available to do so.

2. If there are repeated violations or an aggravation by repetition, a Cease and Desist order is proper and should be entered.

3. The arbitrator has full and plenary authority to impose a penalty to enforce a prior Cease and Desist order in an amount that would be reasonably connected to the circumstances in which it occurs. The enforcement could be payable to the Union.

Reviewing now the facts within this framework of rules, it appears that, in the presence of an abritral rule that the Company should cease and desist having supervisory employees doing classified work, there were a series of violations over the three days referred to in the evidence. They did not take a substantial part of the time, but they took enough time that it can be balanced on all the facts for which the

arbitrator here awards the grievant a total of pay for one-half a shift at straight time.

With regard to the failure of Management to follow the Cease and Desist order, the record shows a series of other violations claimed by members of the Union. Of these, several were settled by Management in line with the new manager's policy of disposing with old grievances. The other grievances were not settled and stand undisposed and are, therefore, unproven allegations. When connected, however, with the past history and with the arbitrations actually heard at this shop, there is proof that the particular violations alleged and proven in this

case were against a background of other violations. It is sufficient to say that the Cease and Desist order has been violated.

On the other hand, however, the action of the supervisors at their level was not the instigated or specified action of the Company. To the contrary, testimony of the manager of this mine is clear and cogent that he has, from the beginning of his tenure, tried to settle all the complaints, tried to clear the deck and has worked carefully to persuade supervisors that they themselves can be punished for failure to obey this rule. Inasmuch as the term of this effort has run about a year and

two months to the time of the hearing, it can be hoped that it will have some further effect.

The direct and effective corrective action of Management shows how and what can and should be done in the presence of an onerous contract rule. The supervisors must learn to avoid entrapment for the sakes of both the Company and themselves.

The violation of the order, however, is not wholly excused by that effort because the integrity of the contract and the function of the arbitrators in the system created by the contract, must be protected. It therefore follows that a penalty can be imposed for violating the prior order,

but that it should be considered in a reasonable amount indicating approval of the Company's efforts to reduce repeated violations. This arbitrator, therefore, allows a penalty for violation of the Cease and Desist order of $1,000.00 to be paid to the Union as one of the parties to these proceedings.

AWARD

The grievance of Kenneth Wagner, No. ICC-88-28-92-292 is hereby ALLOWED on the following terms:

1. Grievant is allowed compensation for one-half a shift pay at straight time.

2. The Cease and Desist order applicable to this mine entered by

Arbitrator Lugar, restated by Arbitrator Judah, is here restated.

3. A penalty for failure to obey the Cease and Desist order, based on the experience since the Judah order, is hereby imposed in the amount of $1,000.00 to be paid to the Union.

This 11th day of November, 1992.

ss: **BERNARD H. CANTOR**

ARBITRATOR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

LOCAL UNION NO. 2232, etc.,

Plaintiff,

-vs-

ISLAND CREEK COAL CO., etc.,

Defendant.

Civil Action No. 90-0052-A

MEMORANDUM OPINION

Defendant, Island Creek Coal Company, Virginia Pocahontas No. 5 Mine ("Island Creek") has moved the court for summary judgment in the above styled matter.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Local Union 2232, District 28, United Mine Workers of

America ("Local No. 2232"), on February 27, 1990, filed a motion for judgment in the Circuit court for Buchanan County, Virginia against Island Creek, pursuant to Sect. 301 of the Labor Management Relations Act, 29 U.S.C. Sect. 185. This action was removed to this court by Island Creek, uncontested by Local No. 2232, pursuant to 28 U.S.C. Sect. 1441(b). Local No. 2232 is asking the court to enforce an arbitration award issued on March 23, 1981, as well as, a grievance resolution dated September 13, 1989 wherein Island Creek agreed to abide by the March 23, 1981 arbitration decision. In addition, Local No. 2232 seeks money damages for the harm it has suffered as a result of the breaches

which occurred within the statutory period.

At all times relevant to this action, both Local No. 2232 and Island Creek were bound by the terms of the "The National Bituminous Coal Wage Agreement of 1978, 1984 and 1988," ("Wage Agreement"). Whether or not these agreements are cumulative is in dispute. The wage agreements contain an exclusive and binding grievance and arbitration procedure to resolve disputes arising under the agreement between Island Creek and Local No. 2232. Specifically, Article IA, Section (c) of each wage agreement also expressly prohibits supervisory employees from performing classified work. Section (c) states the following:

"Supervisory employees shall perform no classified work covered by this Agreement except in emergencies and except if such work is necessary for the purpose of training or instructing classified Employees. When a dispute arises under this section, it shall be adjudicated through the grievance machinery and in such proceedings the following will apply:

The burden is on the Employer to prove that classified work has not been performed by supervisory personnel." (emphasis added).

On March 23, 1981, Arbitrator Marlyn E. Lugar issued a decision which directed Island Creek to "cease

permitting supervisory employees to perform classified work, except as permitted in Article IA, Section (c) ...." Local No. 2232 alleges that intially the performance of classified work by supervisors after the order was not a problem; however, in the past several years, violations have increased significantly. As a result, Local No. 2232 seeks intervention by the court. However, Island Creek contends that the alleged violations of the arbitration order falls within the purview of the wage agreement, and thus the court should refer the parties to the grievance machinery for which they collectively bargained.

II. Statute of Limitations

First, Island Creek argues that the union's attempt to enforce the March 23, 1981 decision of arbitrator Marlyn E. Lugar is time barred. Local No. 2232 brings this claim pursuant to Sect. 301 of the LMRA, 29 U.S.C. Sect. 185. Both parties agree that "Congress has not enacted a statute of limitations governing actions brought pursuant to Sect. 301 of the LMRA . . . (therefore), 'the timeliness of a Sect. 301 suit . . . is to be determined, as a matter of law, by reference to the appropriate state statute of limitations.'" United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60 (1981) (quoting, United Auto

Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966). See also Local Union 8181 v. Westmoreland Coal Co., 649 F. Supp. 603, 605 (W.D. Va. 1986).

In this matter, the parties offer Va. Code Ann. Sect. 8.01-246 which provides for a five (5) year statute of limitations for written contracts as the appropriate statute of limitations. Island Creek cites United Auto Workers as authority for the application of state limitation periods for contract claims to Sect. 301 claims for the breach of collective bargaining agreements. Id. at 705-07. However, Local No. 2232's claim goes beyond the mere breach of a collective bargaining agreement; it involves the enforcement of an arbitration award.

Section 8.01-246 states that "actions founded upon contract, other than judgments or decrees, shall be brought...within five years." (emphasis added). Va. Code Ann. (1984). It is a settled law in Virginia that an arbitration "award, being the judgment of a judge of the parties' own choosing" are to be treated as final and binding unless contrary to law. Va. Beach Realtors v. Hogan, Inc., 224 Va. 659, 662 (1983). Thus, the five-year limitation period of Sect. 8.01-246 expressly excludes valid arbitration awards which are also judgments. Furthermore, "federal courts have clearly held that if an 'arbitration award' has been reached, a Sect. 301

suit is more closely analogized to a suit to vacate an arbitration award to an ordinary contract action." Local Union 8181 v. Westmoreland Coal Co., 649 F. Supp. 603, 606 (W.D. Va. 1986); Ross v. Bethelem Steel Corp., 109 LRRM 2791 (D. Md. 1981) (citing United Parcel Service v. Mitchell, 451 U.S. 56 1981).

Although not plead as such, Local No. 2232 is asking this court to confirm the arbitration award of Ms. Lugar. The Uniform Arbitration Act of Virginia ("The Act") pursuant to Sect. 8.01-581.09 permits the enforcement of arbitration awards in the following manner:

"Upon application of a party, the court shall confirm an award, unless

within the time limits hereinafter imposed grounds are urged for vacating of modifying or correcting the award, in which case the court shall proceed as provided in Sects. 8.01-581.010 and 8.01-581.011." (emphasis added). Va. Code Ann. Sect. 8.01-09 (Supp. 1990).

Sections 8.01-581.010 and 8.01-581.011 require any application to the court to vacate, modify, or correct the award to be filed within 90 days of the issuance of the award. See Va. Code Ann. Sects. 8.01-581.09 - 8.01-581.011 (Supp. 1990); Westmoreland, supra, at 605-606. Thus, absent such petitions to challenge the validity of the award, the court is directed by the General Assembly to confirm the award. In

essence, Sect. 8.01-581.09 establishes an unlimited period of time to confirm or to enforce arbitration awards after the expiration of the 90-day period.

The Supreme Court in Hoosier Cardinal requires state limitation statutes to be analogous to Sect. 301 suits and consistent with federal labor policy. Arguably, a state limitations statute which allows arbitration awards to be confirmed or enforced within an unlimited period of time is contrary to federal policy favoring speedy resolution of labor arbitration disputes. See United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 64 (1981). However, the Supreme Court upon refusing to apply a state six-year limitation period of

contract actions to a Sect. 301 suit, stated:

"(I)f New York had adopted a specific 6-year statute of limitations for employee challenges to awards of a joint panel or similar body, we would be bound to apply that statute under the reasoning of Hoosier Cardinal. But in cases such as this, where general state limitations periods were enacted prior to the enactment of Sect. 301 by Congress in 1947, we are necessarily committed by prior decisional law to choosing among statutes of limitations, none of which fit hand in glove with an action under Sect. 301 (a) of the LMRA." Id.

However, as recent as 1986, Virginia enacted the Uniform Arbitration Act which establishes an indefinite period of time for the confirmation of an award. The Act goes on to mandate that "upon granting confirmation, a judgement or decree shall be entered . . . and be docketed and enforced as any other judgement or decree." Va. Code Ann. Sect. 8.01-581.012. The Supreme Court, by its own statement in Mitchell, has held that any analogous state limitation period promulgated after the enactment of Sect. 301 by Congress is automatically binding. Thus, the court appears to be bound to apply Sect. 8.01-581.09 to the instant case; however, it is still concerned that the unlimited

confirmation period of the Virginia statute will hamper the goals and policies of federal labor law.

In Derwin v. General Dynamics Corp., 719 F.2d 484 (1st Cir. 1983), the court was confronted with a Massachusetts confirmation statute almost identical to Virginia's statute. Section 10 of Mass. Gen. Laws ch. 150C provides that the court "shall confirm an award unless within the time limits herinafter imposed grounds are urged for vacating, modifying or correcting the award." Id. at 489. Section 10 prohibits any challenge to the validity or finality of an arbitration award after the 30-day limitation period.

The First Circuit emphasized how

Sect. 10 automatically cut off stale challenges to arbitration awards, thus "encourag(ing) parties to forego merely formal judicial proceedings aimed at obtaining confirmatory orders." Also, parties could forego the expense of litigation, because they could in good faith treat the unchallenged arbitration award as final. Id. Therefore, a "lengthy period for actions to confirm does not threaten the finality of arbitration award" and is consistent with federal labor policy. Id.

Likewise, the Virginia confirmation statute prohibits any challenge to the validity of an arbitration award after the 90-day period, thus alleviating any concern the court has in regard to the

finality of an award. Consequently, the court should apply Va. Code Ann. Sect. 8.01-815.09 as the appropriate statute of limitations as to Local No. 2232's action to enforce the arbitration award. Since the 90-day period to challenge the arbitration award rendered by Ms. Lugar has long passed, the award may be confirmed by this court.

III. **REFERRAL OF DISPUTE TO ARBITRATION**

The Union alleges that Island Creek has repeatedly violated arbitrator Lugar's order instructing them to cease the use of supervisory employees to perform classified work. As a result, Local No. 2232 is asking this court to enforce the arbitration award and to enjoin Island Creek from permitting

supervisory employees to perform classified work. However, Island Creek argues that the court should not rule on the substantive terms of the 1981 arbitration award as it did five years ago in United Mine Workers of America District 28 and Local Union No. 2232 v. VP-5 Mining Co., and Island Creek Coal Company, 630 F. Supp. 1210 (W.D. Va. 1986).

In that case, Local No. 2232 wanted the court to enforce a grievance settlement prospectively in other grievances pending for arbitration. This court granted VP-5 Mining Company and Island Creek's summary judgement and stated:

"(e)ven where the parties are not

in dispute over the actual terms of a grievance settlement, but only over a breach of those terms has occurred as presented by the circumstances of a subsequent grievance, the court must still defer to the parties' bargained-for method of dispute resolution." Id. at 1214, citing Little Six Corp. v. United Mine Workers of America, 537 F. Supp. 216 (W.D. Va.), affirmed, 701 F.2d 26 (4th Cir. 1983).

Like the settlement agreement, the 1981 arbitration award conclude a specific grievance. There is no fundamental difference between this instant matter and the case heard previously 1986. Furthermore, other courts, including the Third and Fifth

Circuits, who have found that "regardless of how clear it may be that the issues decided at a former arbitration proceeding are identical to those subsequently sought to be relitigated, the question of identity of issues, nevertheless, is for the arbitrator and not the court." Little Six, supra, at 219 (quoting T.L.I., Inc. v. General Teamsters Local Union No. 261, 515 F. Supp. 27, 29 (W.D. Pa. 1981). See also Local 103, Int'l Union of Elec., Radio and Mach. Workers v. RCA Corp., 516 F.2d 1336, 1339 (3rd Cir. 1975); New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d 455, 468 (5th Cir. 1980), affirmed, 457 U.S. 702 (1982). As noted in Little Six, when an

arbitration clause such as Article IA, Section (c) is written very broadly, the court "can not say with positive assurance that the arbitration clause is not suspectible of an interpretation that covers the asserted dispute." Little Six, supra at 221. Thus, once again the court concludes that Local No. 2232 is under a duty to arbitrate.

However, Local No. 2232 directs the court's attention to the latter part of the Little Six opinion where this court stated:

"(A)ssuming there is an exception to the ... duty to arbitrate which allows a federal court to grant declaratory and injunctive relief on res judicata principles prior to

arbitration, the factual basis of the contested grievances must at least be identical." (Citations omitted) Id. at 221. The court acknowledged the existence of a split among the circuits concerning the degree of identity of issues to invoke res judicata. The Seventh Circuit utilizes a narrow standard of identity.

The Union contends that the arbitration awards constitute interpretations of the collective bargaining agreement with a sort of res judicata effect which makes arbitration of the remaining grievance unnecessary. But, "notions of res judicata are less suited to the informal process of industrial arbitration than to the

litigation process, and, to the extent that res judicata has been used in arbitration, a strict factual identity is required."

Id.

In order for this court to relieve Local No. 2232 of its duty to arbitrate, it must find that the identical factual basis of the 1981 decision exists in the present grievance of Union. In essence, the court must find that Island Creek is permitting supervisory employees to perform the same or similar type of work int he Virginia Pocahontas No. 5 mine as determined to be classified work in the 1981 arbitration decision. Furthermore, the burden is on Local No. 2232 to prove identity of issues because it is the

party seeking to avoid arbitration under the principle of res judicata. Id. at 222.

Local No. 2232 attached arbitrator Lugar's opinion from the 1981 arbitration as a part of its complaint. In the opinion, the arbitrator noted that the standard grievance form did not allege the nature of the classified work performed. 1981 arbitration opinion p. 2. However, several witnesses for the Union made brief references to the type of classified work performed by the supervisors, such as, "hung miner cable, rock dusted, set safety jacks in the face, helped clean tailpiece, helped hung curtains, helped bring in supplies, and run the scoop." 1981 arbitration

opinion p. 6. Like the 1981 grievance form, the Union's present complaint does not allege the nature of the recent violation of the arbitration order. The Union attached to their complaint copies of several recent grievance forms concerning classified work performed by supervisors in violation of 1981 arbitration order, however, not one of the grievances alleges the nature of the work performed. Absent some facts as to the nature of the alleged classified work performed by the supervisors, Local No. 2232 has failed its burden to establish identity of issues to invoke res judicata. Therefore, the Union has not shown facts sufficient to entitle it to be relieved of the duty to arbitrate.

Furthermore, Article IA, Section (c) permits supervisory employees to do classified work in emergencies and during training. While the pleadings of neither party bring these issues specifically into issue, the court notes that Island Creek denies every factual allegation of the Union with regard to hiring supervisors or improperly using supervisors in classified jobs. These factual issues must be submitted to an arbitrator, not this court, for decision. Article IA, Section (c) mandates that disputes "be adjudicated through the grievance machinery."

Also, in light of the court's ruling in the 1986 case, any grievance concerning the 1989 agreement resolution

should be resolved by an arbitrator and not this court. Consequently, the court will not address the other issues raised by the parties.

CONCLUSION

In accordance with this Memordandum Opinion, an Order will be entered granting summary judgement to defendant Island Creek.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel or record.

ENTER: This 9 day of January, 1991.

THE HON. GLEN M. WILLIAMS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

ISLAND CREEK COAL COMPANY,

Plaintiff,

-vs-

LOCAL UNION 2232, UNITED MINE WORKERS OF AMERICA, et al.,

Defendants.

Civil Action No. 92-0174-A

MEMORANDUM OPINION

Plaintiff Island Creek Coal Company ("Island Creek") brings this action for declaratory and injunctive relief against defendants International Union, United Mine Workers of America; District 28, United Mine Workers of America; and Local Union 2232, United Mine Workers of America (collectively "UMWA"). Island

Creek seeks to vacate an "enforcement penalty" of $1000.00 imposed by an arbitrator pursuant to the National Bituminous Coal Wage Agreement ("NBCWA"). UMWA has filed a counterclaim seeking to enforce the penalty. The court has jurisdiction pursuant to 29 U.S.C. Sect. 185. The court finds that the arbitrator exceeded the scope of his authority in imposing the penalty and vacates that portion of his award.

The NBCWA prohibits the performance of "classified work" by supervisory personnel. 1/ Island Creek and UMWA

1/ Article IA, Section (c) of the 1988 version of the NBCWA provides:

have a history of disputes that dates to 1981 over Island Creek's performance of classified work. In that year Arbitrator Marlyn Lugar arbitrated a

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Supervisory employees shall perform no classified work covered by this Agreement except in emergencies and except if such work is necessary for the purpose of training or instructing classified Employees. When a dispute arises under this section, it shall be adjudicated through the grievance machinery and in such proceedings the following rule will apply: the burden is on the Employer to prove that classified work has not been performed by supervisory personnel.

(Pl.'s Statement of Material Facts Not in Dispute, Ex., 1 at 5).

grievance concerning the performance of classified work at the same mine involved in this case. Finding that Island Creek violated the NBCWA's prohibition, Lugar ordered Island Creek to cease and desist. He further suggested that "punitive damages" might be appropriate in the event of future violations. The parties settled the same kind of grievance in 1988. Island Creek agreed that it would stop its supervisory employees form performing classified work and abide by Lugar's 1981 decision. The issue arose again in 1990 at the same mine. Arbitrator Peter Judah restated Lugar's cease and desist order and imposed punitive damages of $2000.00. Arbitrator Judah emphasized

that the punitive damages were based on the 1988 settlement agreement and not the bargaining agreement itself.

Island Creek and UMWA entered into the present version of the NBCWA on February 1, 1988. 2/ In 1991 an Island Creek employee filed a grievance asserting that Island Creek violated the agreement when one of its supervisory employees performed classified work.

2/ See National Bituminous Coal Wage Agreement Between Island Creek Corporation and International Union United Mine Workers of America (Pl.'s Statement of Material Facts Not in Dispute, Ex. 1).

The parties ultimately sumbitted the matter to arbitratio pursuant to the terms of the NBCWA. The arbitrator, Bernard H. Cantor, reviewed the history of similar disputes at the mine and the resolution of those disputes. Finding that there had been similar violations and an earlier cease and desist order, he stated:

"If there is something more than a straight forward violation, if there is a pattern of repeated violations, then there can and should be a mandate to cease and desist.

A Cease and Desist order itself, however, must be enforceable. It does not require the existence of a new contract, even though Arbitrator Judah

reached for that fact the Company had been ordered to stop it is sufficient to authorize the arbitrator standing in the stead, as he does, of courts of general jurisdiction for the purpose of dealing with this contract, to lay down a reasonable amount as a rule constituting the imposition of a penalty for violation of a prior order of quasi-judicial body. This is not "punitive damages" in the tort sense. The application of that term to damage given in this situation is absolutely inappropriate. It is an enforcement penalty and it stands as such and is justified by the long history within the Bituminous Coal Industry contract. The contract has grown over time as a way of

life. To those who live by it, there must be no wrong without a remedy. Frustrations have led to Cease and Desist orders. Such an order means nothing unless it can be enforced. The contract comtemplates effective enforcement." Compl. Ex. 1 at 30-31).

Arbitrator Cantor then found that Island Creek violated the NBCWA, awarded the grievant compensation, restated the cease and desist order, and ordered Island Creek to pay UMWA an "enforcement penalty" of $1000.00 because he had found that Island Creek had violated an earlier cease and desist order.

II.

A federal court's review under Sect. 301 of the Labor Management

Relations Act, 29 U.S.C. Sect. 185, of an arbitrator's award is very limited. Cannelton Indus. Inc. v. District 17, United Mine Workers, 951 F.2d 591, 593 (4th Cir. 1991). The parties to a collective bargaining agreement bargain for the arbitrator's interpretation, "and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation . . . is different from his." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960). Moreover, "(t)he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law -- the

practices of the industry and the shop -- is equally a part of the collective bargaining agreement although not expressed in it." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960). See also Clinchfield Coal Co. v. United Mine Workers Dist. 28, Local Union 1098, 567 F. Supp. 1431, 1434 (W.D. Va. 1983), aff'd. 736 F.2d 998 (4th Cir. 1984).

At the very least, however, the arbitrator's decision "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987). Absent an express provision in the collective

bargaining agreement, the industrial common law ordinarily does not, according to the court of appeals for this circuit, permit the arbitrator to impose punitive damages. 3/ See

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3/ Ordinarily punitive damages are not recoverable in contract actions. Although there is some language in the cases in the labor field to the effect that an arbitrator might have some authority to impose punitive damages to redress "willful or wanton conduct," neighter the court of appeals for this circuit nor the Supreme Court has so held. Baltimore Regional Joint Bd., v. Webster Clothes Inc., 596 F.2d 95, 98 (4th Cir. 1979). It is unnecessary to

Cannelton Indus., 951 F.2d at 594; Baltimore Regional Joint Bd., 596 F.2d

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decide the issue in this case, however, because Arbitrator Cantor found no evidence of willful conduct. According to Arbitrator Cantor: "the action of the supervisors at their level was not the instigated or specified action fo the Company. To the contrary, testimony of the manager of this mine is clear and cogent that he has, from the beginning of his tenure, tried to settle all complaints, tried to clear the deck and has worked carefully to persuade supervisors that they themselves can be punished for failure to obey this rule." (Compl. Ex. 1 at 32-33).

at 98; Norfolk & W.R. Co. v. Brotherhood of Ry., Airline and S.S. Clerks, 657 F.2d 596, 602 (4th Cir. 1981); Westinghouse Electric Corp. Aerospace Div. v. International Bhd. of Electric Workers, 561 F.2d 521, 523-24 (4th Cir. 1977), cert. denied, 434 U.S. 1036 (1978). 4/ It follows that this case

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4/ At least three other circuits are in accord. See Dorado Beach Hotel Corp. v. Union de Trabajadores de la Industria Gastronomica Local 610, 959 F.2d 2 (1st Cir. 1992); Howard P. Foley Co. v. International Bhd. of Elec. Workers, Local 639, 789 F.2d 1421, 1423 (9th Cir. 1986); United Elec., Radio and

presents two questions: whether the award is punitive and, if so, whether it draws its essence from the collective bargaining agreement.

A. The Award

Although Arbitrator Cantor distinguishes an "enforcement penalty" from "'punitive damages' in the tort sense," the distinction is not relevant here because the enforcement penalty is still punitive in nature. 5/

Mach. Workers, Local 1139 v. Litton Microwave Cooking Products, Litton Systems, Inc., 704 F.2d 393, 398 (8th Cir. 1983).

5/ Arbitrator Cantor appears to consider the enforcement penalty

Arbitrator Cantor awarded the individual grievant compensation for the invasion of his work time, and no other actual damages have been shown. Thus, as in Baltimore Regional, "there is nothing in the record showing (the award

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nonpunitive because it is not simply an attempt to punish, but rather it is an attempt to coerce through punishment. Although that distinction may be relevant in judicial proceedings where the criminal or civil nature of contempt fines is at issue, see Bagwell v. International Union, United Mine Workers, 423 S.E.2d 349 (Va. 1992), cert. granted, -- U.S. --, 113 S. Ct. 2439, (1993), the issue here is whether the award is punitive.

to be) validly compensatory, and it is manifestly not nominal." 596 F.2d at 98. The award, therefore, though considered nonpunitive by Arbitrator Cantor, is in fact punitive. See id.; Westinghouse, 561 F.2d at 523-24; Georgia Power Co. v. International Bhd. of Elect. Workers, Local 84, 995 F.2d 1030, 1032 (11th Cir. 1993) ("(a)n arbitrator's denomination of an award as compensatory will not prevent the court from determining that the award is in fact punitive").

B. The Agreement

The NBCWA does not expressly provide for punitive awards. If the award is to be validated, therefore, it must find support in the industrial

common law which, according to the Supreme Court, "is equally a part of the collective bargaining agreement although not expressed in it." United Steelworkers, 363 U.S. at 581-82. On that score the court finds that Arbitrator Cantor has imposed his own notion of industrial justice.

In concluding as he did, Arbitrator Cantor reasoned that "(t)he contract contemplates effective enforcement," that effective enforcement requires cease and desist orders, and that cease and desist orders are meaningless without enforcement penalties. His reasoning, which seems to be an effort to bootstrap authority, fails to recognize two points. First, remedies

are available if the parties do not abide by the arbitrator's decision. A party may bring an action in district court to enforce the arbitrator's award whether that award is for a monetary obligation or for a specific relief. Thus, a party may enforce in district court an arbitrator's "cease and desist order" if that order draws its essence from the collective bargaining agreement. See General Dynamics Corp. v. Industrial Union of Marine and Shipbuilding Workers, 469 F.2d 848, 851 (1st Cir. 1972). 6/ That award would

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6/ In fact, "(n)othing could be closer to the core of the federal labor arbitration for by the (collective

then be backed by the equitable powers of the court. Second, the arbitrator is empowered by the collective bargaining agreement, not by unbridled notions of remedial justice. 7/ Generally, the

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bargaining agreement), to an arbitrator's injunction, . . ." General Dynamics Corp., 469 F.2d at 851.

7/ Although Arbitrator Cantor's decision is based upon his apparent perception that an arbitrator has the inherent authority to impose a punitive award if necessary in the arbitrator's view to effectively enforce a collective bargaining agreement, very liberally construed his opinion also suggests that the parties course of dealing at this shop invested him with authority to

(FN 7, cont.) impose those awards. That course of dealing was, however, insufficient. In 1981 Arbitrator Lugar found that supervisory employees had performed classified work in violation of the NBCWA and ordered Island Creek to cease and desist. Arbitrator Lugar also suggested that punitive damages might be imposed if there were additional violations. In 1988 the parties settled a similar grievance, and Island Creek agreed to abide by Lugar's 1981 decision. In 1991 Arbitrator Peter Judah found that supervisory employees had again performed classified work. He issued a cease and desist order. He also imposed punitive damages based on the 1988 settlement agreement.

(FN 7 cont.) None of these events invested Arbitrator Cantor with authority to impose a punitive award. An arbitrator cannot create his own authority . That Arbitrator Lugar believed in 1981 that he might have authority to impose punitive damages in the event of future violations is clearly insufficient. Likewise, the fact that the parties agreed to abide by his decision is insufficient. Lugar decided only that supervisory employees performed classified work, and he ordered the Company to cease and desist. The fact that Arbitrator Judah had found earlier that he had authority to impose punitive damages is immaterial in light of the fact that the present

parties compensatory remedy for violation of their collective bargaining agreement. Absent some expression of mutual assent that bargain does not invest the arbitrator with authority to punish.

III

Punitive damages are not available in either a suit for breach of a collective bargaining agreement or in a suit for breach of a duty of fair representation. See Merk v. Jewel Food Stores Div. of Jewel Cos., 945 F.2d 889, 899 (7th Cir. 1991)m, cert. denied, --

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FN 7, cont. case was not decided under a new agreement negotiated against the backdrop of a clear, common understanding that punitive awards would be within the arbitrator's authority.

U.S. --, 112 S. Ct. 1951 (1992). The potential for high punitive awards in those actions "might threaten the goal of harmonious resolution of labor disputes which is at the core of the national labor policy." Id. at 899. Although the enforcement penalty in the present case is a relatively small one, there is no reason why -- if imposition of such penalties is committed to the remarkably unbridled discretion of a labor arbitrator -- that onerous, yet unreviewable burdens could not be imposed. If the parties are to chart such a course they should do so in unmistakable terms.

For the reasons stated above, the arbitrator's award will be enforced in part and vacated in part.

An appropriate order will issue.

ENTER this 23rd day of September, 1993.

THE HON. SAMUEL WILSON

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ISLAND CREEK COAL COMPANY,

Plaintiff-Appellee,

v.

DISTRICT 28, UNITED MINE WORKERS OF AMERICA,

Defendant-Appellant.

No. 93-2305

Appeal from the United States District Court
for the Western District of Virginia, at Abingdon.
Samuel G. Wilson, District Judge.
(CA-92-174-1

Argued: May 9, 1994

Decided: July 6, 1994

Before WILKINS and HAMILTON, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Wilkins and Judge Ellis joined.

COUNSEL

ARGUED: Susan Debra Oglebay, KOBAK & OGLEBAY, Pound, Virginia, for Appellant, David J. Laurent, POLITO & SMOCK, P.A., Pittsburgh Pennsylvania, for Appellee. ON BRIEF: Daniel L. Fassio, Pittsburgh, Pennsylvania, for Appellee.

OPINION

HAMILTON, Circuit Judge:

District 28, United Mine Workers of America (District 28), appeals the district court's decision vacating the penalty portion of an arbitration award. For the reasons stated herein, we affirm.

I

The National Bituminous Coal Wage Agreement of 1978, 1984, and 1988 (NBCWA) prohibits the performance of "classified work" 1/ by supervisory

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1/ Classified work is bargaining unit work reserved for classified employees.

personnel. 2/ Island Creek Coal Company

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2 /Article 1A, Sect. (c) of the 1988 version of the NBCWA provides:

> Supervisory emplyees shall perform no classified work covered by this Agreement except in emergencies and except if such work is necessary for the purpose of training or instructing classified Employees. When a dispute arises under this section, it shall be adjudicated through the grievance machinery and in such proceedings the following rule will apply: The burden is on the Employer to prove that classified work has bot been performed by supervisory personnel.

(Island Creek) and the International Union, United Mine Workers of America; District 28, United Mine Workers of America; and Local Union 2232, United Mine Workers of America (collectively UMWA) have a history of disputes dating to 1981 over Island Creek's performance of classified work. In that year Arbitrator Marlyn E. Lugar (Lugar) arbitrated a grievance concerning the performance of classified work at the Virginia Pocahontas Number 5 Mine (the Mine).3/ Finding that Island Creek

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3/ Island Creek oversees several mining operations in Virginia, including the Virginia Pocahontas Number 5 Mine.

violated the NBCWA's prohibition on classified work, Arbitrator Lugar ordered Island Creek to cease and desist. He intimated that "punitive damages" might be appropriate in the event of future violations.

In 1988, the parties settled the same type of grievance. Island Creek agreed that it would stop its supervisory employees from performing classified work and would abide by Arbitrator Lugar's 1981 decision. The issue arose again in 1990 at the Mine. Arbitrator Peter J. Judah (Judah) restated Arbitrator Lugar's cease and desist order and imposed punitive

damages of $2,000. 4/ Arbitrator Judah emphasized that the punitive damages were based on the 1988 settlement agreement rather than on the NBCWA itself.

On February 1, 1988, Island Creek and UMWA entered into the present version of the NBCWA. The 1988 NBCWA contained a mandatory means for resolving disputes arising under that agreement: a three-step grievance procedure followed, if necessary, by final and binding arbitration. The NBCWA does not expressly provide for an award of punitive damages.

4/ Island Creek paid this punitive award on July 23, 1991, apparently without protest.

On or about November 13, 1991, one of Island Creek's employees filed a grievance alleging that a foreman had violated the 1988 NBCWA by performing classified work. The parties ultimately submitted the matter to arbitration pursuant to the terms of the NBCWA. Arbitrator Bernard H. Cantor (Cantor) reviewed the history of disputes at the Mine. Determining that there had been similar violations and an earlier cease and desist order, he stated:

"If there is something more than a straight forward violation, if there is a pattern of repeated violations, then there can and should be a mandate to cease and desist. A cease and desist order itself, however, must be

enforceable. It does not require the existence of a new contract, even though Arbitrator Judah reached for that further support for his decision. The straightforward fact that the Company had been ordered to stop it is sufficient to authorize the arbitrator standing in the stead, as he does, of courts of general jurisdiction for the purpose of dealing with this contract, to lay down a reasonable amount as a rule constituting the imposition of a penalty for violation of a prior order of quasi-judicial body."

This is not "punitive damages" in the tort sense. The application of that term to damages given in this situation is absolutely inappropriate. It is an

enforcement penalty and it stands as such and is justified by the long history within the Bituminous Coal Industry contract. The contract has grown over time as a way of life. To those who live by it, there must be no wrong without a remedy. Frustrations have led to Cease and Desist orders. Such an order means nothing unless it can be enforced. The contract contemplates effective enforcement.

A. 71). Arbitrator Cantor then issued the following award:

(1) Grievant is allowed compensation for one-half a shift pay at straight time.

(2) The Cease and Desist order applicable to this mine entered by

Arbitrator Lugar, restated by Arbitrator Judah, is here restated.

(3) A penalty for failure to obey the Cease and Desist order, based on the experience since the Judah order is hereby imposed in the amount of $1,000 to be paid to the Union. A. 74-75) (Emphasis added).

After Arbitrator Cantor's award, Island Creek brought an action in the United States District Court for the Western District of Virginia for declaratory and injunctive relief against the UMWA. Island Creek sought to vacate the "enforcement penalty" of $1,000 imposed by Arbitrator Cantor. The UMWA filed a counterclaim seeking to enforce the penalty. Finding that

Arbitrator Cantor exceeded the scope of his authority in imposing the penalty, the district court vacated that portion of the award. The district court enforced the other portions of the arbitration award. District 28 appeals from that portion of the order vacating the penalty part of Arbitrator's Cantor's decision.5/

II

The question of whether a labor arbitrator exceeded the scope of his

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5/ United Mine Workers of America, Local 2232 (Local 2232) and International Union, United Mine Workers of America, are not parties to this appeal.

authority is a question of law, Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31, 933 F.2d 225, 228 (4th Cir. 1991) Therefore, in the instant case, we review the district court's ruling de novo. Id. We are required to "stand in the shoes of the district court" in determining whether Arbitrator Cantor exceeded the scope of his authority. Id.

An Arbitrator's award is entitled to special judicial deference on judicial review. Accordingly, federal court's review of an arbitrator's award under Sect. 301 of the Labor Management Relations Act, 29 U.S.C. Sect. 185, is very limited. United Steel Workers of

America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960); Cannelton Indus., Inc. v District 17, United Mine Workers of Am., 951 F.2d 591, 593 (4th Cir. 1991). The parties to a collective bargaining agreement bargained for the arbitrator's interpretation, and "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation...is different from his." United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960). The arbitrator's decision, however, "must draw its essence from the contract and cannot simply reflect the arbitrator's own

notions of industrial justice." United Paper Workers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987); Upshur Coals, 933 F.2d at 229. Consequently, "(a)n award may be overturned only if the arbitrator must have based his award on his own personal notions of right and wrong, for only then does the award fail to draw its essence from collective bargaining agreement." Upshur Coals, 933 F.2d at 229 citing E.I. DuPont de Nemours & Co. v. Grasselli Employees Assoc., 790 F.2d 611, 614 (7th Cir. 1986) (citations omitted).

III

Absent express provision in the collective bargaining agreement, the law of this circuit does not permit an

arbitrator to impose punitive award or punitive damages. Cannelton Indus.; Norfolk & W. Ry. Co., v. Brotherhood of Ry., Airline and Steamship Clerks, 657 F.2d 596, 602 (4th Cir. 1981); Westinghouse Elec. Corp v. Aerospace Div. v. International Bhd. of Elec. Workers, 561 F.2d 521, 523-24 (4th Cir. 1977), cert. denied, 434 U.S. 1036 (1978). We first addressed the issue of punitive awards in Westinghouse. There the arbitrator found that the employer had breached the agreement by failing to provide sufficient time for the parties to negotiate a vacation shutdown arrangement. Although no employees suffered an economic loss as a result of that breach, the arbitrator ordered the

employer to pay three additional days of vacation. The contract did not contain language permitting punitive damages. On appeal, we vacated that portion of the award, reasoning that "(t)hough nominally compensatory, the award was actually punitive. Because no provision in the contract warranted this punishment, the arbitrator exceeded his jurisdiction." Id. at 523.

Likewise, we refused to uphold a punitive award not provided for in the collective bargaining agreement in Baltimore Regional Joint Auth. v. Webster Clothes, 596 F.2d 95 (4th Cir. 1979). In that case, the arbitrator found that the employer had breached a subcontracting restriction and ordered

the employer to pay $80,000 to the grievants even though they had been working full-time and suffered no actual loss as a result of the breach. Vacating the $80,000 payment portion of the award, we reasoned that

"(t)he award of damages in the present case does not draw its essence from the bargaining agreement, for the agreement's essence does not comtemplate punitive, but only compensatory awards...In the absence of any provision for punitive awards, and of any substantiating proof of willful or wanton conduct, an arbitrator may not make an award of punitive damages for breach of a collective bargaining

agreement." Baltimore Regional Joint Bd., 596 F.2d at 98 6/

6/ It is unclear whether punitive damages may be imposed in the absence of a provision in the collective bargaining agreement allowing punitive damages where willful and wanton conduct is present: "With respect to vacation shutdowns, compensatory damages may be awarded only when a breach of the bargaining agreement causes a monetary loss. In the absence of willful or wanton conduct, punitive damages should not be awarded.: Westinghouse, 561 F.2d at 523. We need not decide whether an arbitrator can issue a punitive award in

the face of wanton conduct only because there is absolutely no evidence in the record that Island Creek acted willfully or wantonly in this case. (J.A. 107).

Along a similar vein, language in Baltimore Regional Joint Board referring to willful and wanton conduct may have created some confusion inasmuch as it appears to imply that, in order to award punitive damages, there must be (1) an express provision in the bargaining agreement and (2) willful and wanton conduct. Our subsequent precedent, however, has never endorsed the view that both a provision expressly allowing punitive damages and evidence of willful and wanton conduct is necessary. Cannelton Indus., 951 F.2d at 594; Norfolk & W. Ry. Co., 657 F.2d at 602.

In Cannelton Industries, 951 F.2d at 591, the collective bargaining agreement did not provide for punitive damages. The arbitrator in Cannelton found that the employer had violated the terms of a prior arbitration award that required it to notify the union before it hired an outside contractor. The arbitrator proceeded to hold that, given this violation, he was not required to address the merits ofthe dispute over whether the subcontracting actually breached the substantive terms of the collective bargaining agreement. Finally, the arbitrator issued a monetary award which the union characterized as compensatory, and the employer characterized as punitive.

This court, however, remanded the case for a determination by the arbitrator as to whether the subcontracting violated the agreement "in any way justifying a compensatory award." Id. at 595. We reasoned as follows:

"It is not clear from Basial's opinion whether he awarded money damages because Cannelton violated the notice requirements and the Volz award or because Cannelton violated the NBCWA by contracting out work that union employees should have performed. If basial ruled for the former reason, as Cannelton argues, the award is purely punitive and it does not draw its essence from the NBCWA. Cannelton at 594.

In the wake of this authority, there is little doubt that the $1,000 award in this case is punitive. Arbitrator Cantor awarded the individual grievant compensation for invasion of his work time. Entitlement of compensatory damages for contract breach rests on a party's suffering "some legally cognizable loss, be it manifestly monetary or measurable in monetary terms." National Regional Joint Bd. There is nothing in the record establishing this award as compensatory. Moreover, we regard as further evidence of the punitive nature of the award the fact that the $1,000 payment was to be made to Local 2232 rather than to any individual grievant.

As a result, the award issued by Arbitrator Cantor is punitive. Because the NBCWA contained no express provision allowing the award of punitive damages, the punitive damage award issued by Arbitrator Cantor did not draw its essence from the collective bargaining agreement, and therefore, cannot be sustained. Cannelton Indus., 951 F.2d at 594. 7/

7/ District 28 also attempts to distinguish between punitive awards and awards intended as a penalty. It argues that the award in the instant case of a "penalty" rather than "punishment." See International Union of Operating Engineers, Local No. 450 v. MidValley,

Footnote 7, cont.

Inc., 347 F. Supp. 1104 (S.D. Tex. 1972); Sidney Wanzer & Sons, Inc., v. Milk Drivers Union, 249 F. Supp. 664 (N.D. Ill. 1966). We cannot agree with, and no cases in this circuit support, District 28's distinction. A penalty and punitive damages achieve the same result. Punitive damages are imposed not to compensate a plaintiff, but to be "exemplary, punitive, or vindictive damages (imposed) upon a defendant." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 16 (1991) (quoting Day v. Woodworth, 54 U.S. 363 (1852). In the instant case, Arbitrator Cantor awarded the individual grievant conpensation for

Nevertheless, District 28 makes several arguments in support of Arbitrator Cantor's award. First, District 28 argues that, once issued, the arbitrator has the authority to the

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FN 7, cont. invasion of his work time, and no other actual damages were shown. Therefore, although Arbitrator Cantor considered the award nonpunitive, it is in fact punitive. See Westinghouse, 561 F.2d at 523-34; Georgia Power Co. v. International Bhd. of Elec. Workers, Local 84, 995 F.2d 1030, 1032 (11th Cir. 1993). An arbitrator's denomination of an award as compensatory will not prevent the court from determining the award is in fact punitive."), cert. denied, 114 S. Ct. 1644 (1994).

enforce a cease and desist order. This argument, however, circumvents the issue in this case. The question here is not whether an arbitrator can enforce a cease and desist order, but whether he can order punitive damages in the absence of an express provision in the collective bargaining agreement permitting the award of punitive damages. Case law in this circuit has repeatedly held that an arbitrator may not award punitive damages if the collective bargaining agreement does not expressly provide for such an award, and we are not at liberty to disturb it.8/

8/ District 28 contends that our recent decision in Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.,

FN 8, cont.

991 F.2d 141 (4th Cir. 1993) alters our well-established precedent disallowing any punitive award unless expressly provided for in the collective bargaining agreement. We disagree. In Peoples Sec. Life, we upheld an arbitration award that included treble damages. Unlike in the instant case, however, the underlying arbitration agreement in that case authorized the arbitration panel to consider claims under North Carolina's Unfair Trade Practices Act, which specifically permits an award of treble damages.

Second, District 28 argues that Arbitrator Cantor's award should be enforced even though NBCWA does not provide for punitive awards. In support of its contention, District 28 points to decisions from other circuits allowing punitive damages even though the collective bargaining agreement did not provide for such awards. See Lee v. Chica, 983 F.2d 883 (8th Cir. 1993), cert. denied, 114 S. Ct. 287 (1993); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991); Raytheon v. Automated Business Sys., Inc., 882 F.2d 6 (1st Cir. 1989); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988); Local 369, Bakery & Confectionary Workers Int'l Union of

Am., AFL-CIO v. Coston Baking Co., Inc., 514 F.2d 1235 (5th Cir. 1975), cert. denied, 423 U.S. 1055 (1976); Local 416, Sheetmetal Workers Int'l Ass'n v. Heigesteel Corp., 335 F. Supp. 812 (W.D. Wis. 1971), rev'd on other grounds, 507 F.2d 1053 (7th Cir. 1974)." 9/

9/ District 28 argues that these circuits allow an award of punitive damages unless the collective bargaining agreement specifically prohibits such an award. Although District 28 argues that the Sixth Circuit also allows punitive damages in arbitration awards, it admits that the status of such punitive awards remains unclear in that circuit. See Local 120 v. Brooks Foundry, Inc., 892

Regardless of the law in other circuits, however, we have consistently held that punitive damage awards are not allowable unless expressly provided for in the collective bargaining agreement. See, e.g., Cannelton, 951 F.2d at 594. Otherwise, the award "does not draw its essence from the bargaining agreement." Id. at 596 (Hamilton, J., dissenting).

F.2d 1283, 1286-90 (6th Cir. 1990). Island Creek agrees that the Fifth and Eleventh Circuits allow a punitive award unless specifically prohibited by the agreement; however, Island Creek contends that the First, Sixth, Seventh, Eighth, and Ninth Circuits look to the collective bargaining agreement to determine if punitive damages have been authorized.

IV

In summary, we hold that an arbitrator cannot award punitive damages where the collective bargaining agreement does not specifically so provide. Accordingly, the judgment of the district court is affirmed.

Supreme Court, U.S.
FILED
OCT 31 1994
OFFICE OF THE CLERK

No. 94-711

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

UNITED MINE WORKERS OF AMERICA
DISTRICT 28,

Petitioner,

v.

ISLAND CREEK COAL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondent, Island Creek Coal Company, does not agree with Petitioner's statement of the question presented. Instead, Island Creek Coal Company submits that the question presented for review is whether an arbitrator, in a private labor arbitration subject to review under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Section 185(a), exceeds the scope of his authority by awarding punitive damages where the collective bargaining agreement does not expressly empower the arbitrator to issue punitive awards?

LIST OF PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the United Mine Workers of America, District 28, and Island Creek Coal Company.

E.I. DuPont deNemours & Company and RWE A.G., through a series of wholly owned subsidiaries, own all of the stock of Island Creek Coal Company.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

No. 94-711

UNITED MINE WORKERS OF AMERICA
DISTRICT 28,

Petitioner,

v.

ISLAND CREEK COAL COMPANY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of
Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Petitioner seeks review of the decision by the United States Court of Appeals for the Fourth Circuit reported as Island Creek Coal Company v. District 28, United Mine Workers of America, 29

F.3d 126 (4th Cir. 1994), which affirmed the decision of the District Court reported as Island Creek Coal Company v. Local Union 2232, United Mine Workers of America, 832 F.Supp. 165 (W.D. Va. 1993).

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Section 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

COUNTERSTATEMENT OF THE CASE

I. Nature of the Case

Island Creek Coal Company ("Island Creek") filed this action under Section 301(a) of the Labor Management Relations Act ("Act"), 29 U.S.C. Section 185(a), to vacate a November 11, 1992 private labor arbitration award issued by Bernard H. Cantor which, among other things, directed Island Creek to pay a $1,000.00 penalty. (Appendix ("App.") at 108-109.) The District Court found that Arbitrator Cantor exceeded the scope of his authority under the parties' National Bituminous Coal Wage Agreement of 1988 ("NBCWA") by awarding punitive damages and, therefore, vacated that portion of his Award. (App. at 108-129.) The Court of Appeals for the Fourth Circuit affirmed the District Court's ruling. (App. at 130-59.)

II. Factual Background

The parties' NBCWA contained a mandatory means for resolving disputes arising under that Agreement which included a three-step grievance procedure followed, if necessary, by final and binding arbitration. (App. at 2-4.) On or about November 13, 1991, an employee filed a grievance alleging that a foreman had violated the NBCWA by performing classified work. The parties were not able to resolve this grievance and the matter was referred to arbitration. Ultimately, Arbitrator Cantor found that Island Creek had violated the NBCWA and issued the following Award:

> The grievance of Kenneth Wagner, No. ICC-88-28-92-292 is hereby ALLOWED on the following terms:
>
> 1. Grievant is allowed compensation for 1/2 a shift

pay at straight time.

2. The cease and desist order applicable to this mine entered by Arbitrator Lugar, restated by Arbitrator Judah, is hereby restated.

3. A penalty for failure to obey the cease and desist order, based on the experience since the Juda order, is hereby imposed in the amount of $1,000.00 to be paid to the Union.

(App. at 80-81.)

SUMMARY OF THE ARGUMENT

There is no conflict among the Circuits that have addressed the narrow question of whether an arbitrator, in a private labor arbitration subject to review under Section 301(a) of the Labor Management Relations Act ("Act"), 29 U.S.C. Section 185(a), may award punitive damages where the collective bargaining agreement does not expressly authorize the arbitrator to issue punitive awards. The three Circuits (First, Fourth, and Ninth) that have addressed this narrow question have unanimously held that an arbitrator exceeds the scope of his authority by issuing such an award. Although, as Petitioner asserts, several Circuits have upheld punitive arbitration awards, those decisions are distinguishable because they involved commercial arbitrations, agreements that expressly authorized punitive awards,

and/or awards which were determined to be compensatory, rather than punitive. Therefore, there is no conflict among the Circuits.

Moreover, there is no other reason for granting the petition for writ of certiorari. Although a court's review of labor arbitration awards is severly circumscribed under Section 301(a), an award may be vacated where, as here, the arbitrator exceeded the scope of his authority under the collective bargaining agreement. Further, the Court of Appeals' decision does not leave Petitioner without an effective remedy. Petitioner received full compensatory damages and retains the right to seek, by way of collective bargaining, express authority for an arbitrator to award punitive damages in an appropriate case.

Accordingly, the petition for writ of certiorari should be denied.

ARGUMENT

I. There Is No Conflict Among The Circuits.

The Court of Appeals, relying on several of its prior decisions under Section 301(a) of the Act, 29 U.S.C. Section 185(a), held that Arbitrator Cantor exceeded the scope of his authority by issuing a punitive award since the NBCWA did not expressly empower an arbitrator to issue such awards. The Court Appeals' decision on this narrow question is consistent with those of the only other Circuits to have addressed it. The First Circuit reached the same conclusion in Bacardi Corporation v. Congresso de Uniones Industriales de Puerto Rico, 692 F.2d 210, 214 (1st Cir. 1982) ("The arbitrator's opinion cites no provision of the contract authorizing punitive damages or attorney's fees . . . . We must conclude that the award of such

damages did not draw its essence from the collective bargaining agreement and that the arbitrator clearly exceeded his authority"), and the Ninth Circuit reached the same conclusion in Howard P. Foley Company v. International Brotherhood of Electrical Workers, 789 F.2d 1421, 1423 (9th Cir. 1986) ("The award of damages in the present case does not draw its essence from the CBA for the agreement's essence does not contemplate punitive, but only compensatory awards.")

Petitioner asserts that there is a conflict among the Circuits because several Circuits have upheld punitive arbitration awards. On close examination, however, it is apparent that there is no true conflict as the cases Petitioner cites, along with other cases Island Creek has found, all are distinguishable.

Several of the cases Petitioner

cites involve commercial arbitrations which were being referenced under the Federal Arbitration Act and/or the Rules of the American Arbitration Association. See Raytheon Company v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989); Lee v. Chica, 983 F.2d 883 (8th Cir. 1993), cert. denied, 114 S.Ct. (1993); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991); Willoughby Roofing & Supply Company v. Kajima International, Inc., 776 F.2d 269 (11th Cir. 1985).

This factual distinction is significant because commercial arbitrations are not constrained by the federal policies which apply to labor arbitrations under Section 301(a) of the Act, 29 U.S.C. Section 185(a). As the Court of Appeals for the First Circuit observed in Raytheon Company:

> Relying on two labor

arbitration cases (one of them our own), Raytheon argues that arbitrators must have explicit contractual authorization before they can award punitive damages. [Citations omitted.] However, the concerns which may warrant such a rule in the labor arbitration field are not present in the commercial arbitration context. Labor arbitration is an integral aspect of the entire collective bargaining process; it is intended to be part of a continuing and ameliorating enterprise between parties who maintain an ongoing working relationship.

. . . .

Commercial arbitration, by contrast and as this case

> itself exemplifies, is normally considered a one-shot endeavor, in which the parties have chosen arbitration not as a means of ongoing dispute resolution, but as a "simpl[e], informal[], and expeditio[us] method of resolving a particular dispute . . . . Given the profound differences between these two types of arbitration, the [labor] cases are of little relevance to our decision here and we must, therefore, focus our attention on cases addressing the propriety of punitive awards in commercial arbitration settings. (Emphasis added.)

882 F.2d at 10-11. See also Todd Shipyards Corporation, 943 F.2d at 1062 n.5.

One case Petitioner cites can be distinguished because the collective bargaining agreement authorized the arbitrator to award more than compensatory damages. In Goss Golden West Sheet Metal, Inc. v. Sheet Metal Workers International Union, Local 104, 933 F.2d 759, 764 (9th Cir. 1991), the Court upheld the punitive award only because the collective bargaining agreement expressly authorized the arbitrator to award "such relief to either party as [it] deem[s] necessary and proper, including awards of damages or other compensation." (Emphasis added.)

Specific language in the collective bargaining agreement similarly supported the punitive awards upheld in Dorado Beach Hotel Corporation v. Union de Trabajadores, 959 F.2d 2, 4 n.3 (1st Cir. 1992) ("The arbitrator's finding that the

CBA and the parties' submissions authorized the imposition of double damages distinguishes this case from Bacardi Corp. . . . ."), and International Association of Heat and Frost Insulators v. General Pipe Covering, Inc., 792 F.2d 96, 100 (8th Cir. 1986) ("In this case, the Agreement expressly stated that where either party violated any of its provisions, '[t]he Trade Board [would] have the power to award fines or other penalties'").

Petitioner's remaining cases are distinguishable because the awards were found to be compensatory, rather than punitive, or the court declined to resolve the issue presented herein. In Local 369, Bakery and Confectionary Workers International Union of America, 514 F.2d 1235 (5th Cir. 1975), the Court of Appeals for the Fifth Circuit declined to rule on the question of whether an

arbitrator was inherently authorized to issue a punitive award since the award in that case could be considered compensatory. In Local 120, International Molders and Allied Workers Union, 892 F.2d 1283, 1291 (6th Cir. 1990), the Court of Appeals for the Sixth Circuit concluded that the award could be considered either as compensatory or punitive and, for that reason, deferred to the arbitrator. In Local 416, Sheet Metal Workers International Association v. Helgesteel Corporation, 507 F.2d 1053, 1057-58 (7th Cir. 1974), the Court of Appeals for the Seventh Circuit declined to rule on the propriety of a punitive award, finding that the entire dispute should be rearbitrated before a different body.

Although not cited in Petitioner's brief, the remaining decisions by the Circuits that have addressed the subject

of punitive labor arbitration awards all are equally distinguishable from this case.

Several of these decisions involve disputes arising under the Railway Labor Act, 45 U.S.C. Section 153. See Union Pacific Railroad Company v. United Transportation Union, 3 F.3d 255 (8th Cir. 1993); International Association of Machinists and Aerospace Workers v. Northwest Airlines, Inc., 858 F.2d 427 (8th Cir. 1988); Brotherhood of Railroad Trainmen v. Central of Georgia Railway Company, 415 F.2d 403 (5th Cir. 1969). The fact that these cases involve the Railway Labor Act distinguishes them from cases subject to review under Section 301(a) of the Act, 29 U.S.C. Section 185(a). Northwest Airlines, Inc., 858 F.2d at 431.

In another case, Georgia Power Co. v. International Brotherhood of

Electrical Workers, Local 84, 995 F.2d 1030, 1032 (11th Cir. 1993), cert. denied, 114 S.Ct. 1644 (1994), the Court of Appeals for the Eleventh Circuit declined to address the issue, finding that "even if authority existed for punitive damages, the arbitrator's own findings foreclose any argument that a punitive damage award was warranted in this case."

Accordingly, on the narrow question of whether an arbitrator, in a private labor arbitration subject to review under Section 301 of the Act, exceeds the scope of his authority by issuing a punitive award where the collective bargaining agreement does not expressly empower the arbitrator to issue such awards, there is no conflict among the Circuits, Instead, the few Circuits that have addressed the issue (First, Fourth, and Ninth) have unanimously concluded that the arbitrator

exceeds the scope of his authority by issuing a punitive award.

II. Petitioner's Remaining Arguments Do Not Warrant Granting The Petition For Writ Of Certiorari.

Petitioner also argues that the Court of Appeals' decision should be reviewed because (a) it interferes with federal labor policy in that it leaves Petitioner without an effective remedy, and (b) it violates this Court's decision in United Paperworkers International Union v. Misco, 484 U.S. 29 (1987).[1] Petitioner is wrong on both counts.

A. Petitioner Is Not Left Without An Effective Remedy.

Petitioner claims that, as a matter of federal labor policy, an arbitrator

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[1] Petitioner's further argument that the Court of Appeals ignored the parties' so-called custom does not warrant a writ of certiorari under Rule 10 of the Rules of the Supreme Court of the United

(Footnote continued)

should be deemed to have the power to issue punitive awards in the absence of a provision in the collective bargaining agreement which expressly withholds such authority. Petitioner reasons that the authority to issue punitive awards must be inferred as a matter of law as that is the only way to remedy violations of a prior arbitrator's cease and desist order. Petitioner is mistaken.

The grievant in this case was fully compensated for all time lost as a consequence of Island Creek's breach of the collective bargaining agreement and violation of a prior arbitrator's decision on the same subject matter. Therefore, the only question is whether this Court should, as a matter of law, infer that an arbitrator has the

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[1](continued)
States.

contractual authority to go beyond awarding compensatory damages and award punitive damages to enforce the collective bargaining agreement and/or prior arbitration decisions issued thereunder. Island Creek submits that such authority should not be inferred as doing so would undermine federal labor policy in two respects.

First, although the dispute between the Petitioner and Island Creek has been ongoing in some form since 1981, and although the law on this narrow issue has been settled for several years, the parties have not modified their collective bargaining agreements so as to expressly authorize an arbitrator to issue punitive awards. In this context, to hold that, as a matter of law, an arbitrator has the authority to punish, where such punishment would be subject to only minimal court review, would

contravene federal labor policy. Specifically, it would drastically upset the parties' expectations and interfere with their ongoing relationship. As the Court of Appeals for the Seventh Circuit observed in Miller Brewing Company v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1165 (8th Cir. 1984):

> [A]rbitrators are rarely thought authorized to award punitive damages. It is not the kind of remedy that the parties probably would have agreed to authorize if they had thought about the matter, because of the great power it would give the arbitrator (subject to virtually no judicial review), and the bitter note a claim for punitive damages could inject into the parties' relationship,

which is a continuing one.

See also Raytheon Company, 882 F.2d at 10 ("Punitive actions are disfavored; the award of punitive damages in the midst of a steady stream of arbitration between a company and its unions might well undercut both sides' confidence in the arbitration process and decrease their commitment to this essential aspect of 'industrial self-government.'").

Second, since authority to issue a punitive award turns on the terms of the collective bargaining agreement, Petitioner always has the right to negotiate such authority into the parties' collective bargaining agreement. Indeed, federal labor policy would be furthered by negotating such authority, rather than obtaining it by court decree, as federal labor policy supports good faith bargaining. See Sections 8(a)(5), (b)(3), and (d) of the National Labor

Relations Act, 29 U.S.C. Sections 158(a)(5), (b)(3), and (d).

Accordingly, Petitioner has an adequate remedy under the Court of Appeals' decision and, in fact, Petitioner's requested relief should be rejected as it would undermine federal labor policy.

B. The Court Of Appeals' Decision Falls Within The Constraints Imposed By Misco.

Although Misco limits a court's review of a labor arbitration award, the award "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." Misco, 484 U.S. at 38. Thus, if the arbitrator is not even arguably acting within the scope of his or her authority, the award does not draw its essence from the agreement and may be vacated. Id.

The Court of Appeals vacated the punitive aspects of Arbitrator Cantor's Award because it found that the NBCWA did not authorize him to issue punitive awards. This finding is supported by the express terms of the NBCWA (which do not provide any such authority), as well as several prior decisions from the only Circuits to have addressed this narrow question.

Accordingly, the Court of Appeals properly vacated the punitive aspects of Arbitrator Cantor's Award under Misco.

III. This Court's Recent Issuance Of A Writ Of Certiorari In A Case Involving A Punitive Damage Award In A Commercial Arbitration Does Not Warrant The Granting Of This Petition.

This Court recently granted certiorari in a case involving a punitive award in a commercial arbitration. See Mastrobuono v. Shearson, Leeman, Hutton,

Inc., 62 L.W. 2625 (1994).[2] Nevertheless, the questions in Mastrobuono are far different than those presented herein.

The questions presented in Mastrobuono are as follows:

> (1) Did Seventh Circuit err in holding, contrary to rulings of First, Eighth, Ninth, and Eleventh Circuits, that law of state named in choice of law provision, rather than Federal Arbitration Act, governs arbitrability of claim for punitive damages arising out of contract that evidences transaction involving commerce and that contains comprehensive arbitration clause? (2) Did

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[2] The Court of Appeals' decision is reported at 20 F.2d 713 (7th Cir. 1994).

> Seventh Circuit err in holding, contrary to precedent of this court and Eleventh Circuit, that party to contract waives right to recover punitive damages by entering into contract that provides that agreement is governed by law of state that does not permit arbitral awards of punitive damages and comprehensive arbitration clause?

62 L.W. at 2625.

In contrast, this case (a) involves a private labor arbitration award subject to review under the Act, rather than a commercial arbitration award subject to review under the Federal Arbitration Act, (b) involves consideration of federal labor policies which are not applicable to commercial arbitrations, and (c) there is no split in the Circuits on the narrow

issue presented herein under Section 301(a) of the Act, 29 U.S.C. Section 185(a). Accordingly, consideration of the questions presented in Mastrobuono will not be enhanced or furthered by consideration of this case.

CONCLUSION

The narrow issue presented by this case is whether an arbitrator, in a private labor arbitration subject to review under Section 301 of the Act, exceeds the scope of his authority by awarding punitive damages where the collective bargaining agreement does not expressly empower the arbitrator to issue punitive awards. The Circuits that have addressed this narrow issue have unanimously held that an arbitrator exceeds the scope of his authority by issuing such an award, and that conclusion is consistent with federal labor policy, which favors adding rights under collective bargaining agreements by negotiation, rather than court decree.

Accordingly, for all of these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 1994, in compliance with Rule 29 of the Rules of the United States Supreme Court, three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed, by regular mail, postage prepaid, to the following counsel for United Mine Workers of America, District 28:

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